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A

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OF

PRECEDENTS,

FROM THE

BEST MODERN MANUSCRIPT COLLECTIONS,

AND

Drafts of Actual Practice;

WITH

GENERAL COMMON FORMS AND VARIATIONS

ADAPTED TO ALL THE CIRCUMSTANCES USUALLY OCCURRING;

FORMING A

SYSTEM OF CONVEYANCING;

WITH

DISSERTATIONS, AND PRACTICAL NOTES.

132/49 D.

The Second Edition,

BY

THOMAS JARMAN, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

IN CONTINUATION OF THE WORK OF THE LATE

W. M. BYTHEWOOD, Esq.

VOL. IV.

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ADVERTISEMENT.

IN consequence of the decease of Mr. BYTHEWOOD, which produced an interruption of this Work, its continuation was undertaken by the present Editor, in conjunction with Mr. HAYES, whose professional engagements have induced him to withdraw his name; though the Editor still promises himself the advantage of communicating with his Friend upon points as they arise. The Work will be conducted upon the plan adopted by the late Editor, which has received the approbation of the Profession. In selecting the Precedents, a preference has been given to those which adapt themselves most readily to circumstances of ordinary occurrence; and in the Notes, the Editor has been desirous to embody as much practical information as possible, assigning the largest space to the discussion of those points which the numerous works of merit, that now facilitate the researches of the Student and Practitioner, have left untouched or unexhausted.

THE Editor has been much encouraged, in the prosecution of his labours, by the kindness and courtesy which he has experienced in his intercourse with his Professional Brethren; and he cannot deny himself

the pleasure of particularly acknowledging the aid derived from the suggestions of his friend Mr. INGRAM.

IT should be stated that Mr. BYTHEWOOD's portion of the present Volume terminates with the article "Disclaimer."

THOMAS JARMAN.

1, *Garden Court, Middle Temple,*
19th October, 1827.

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TO THE

SECOND EDITION OF THE FOURTH VOLUME.

THE present Edition contains the alterations which have been made in the law, since the publication of the former Edition, either by statute or decision, on the points discussed in this Volume, with a few slight variations in and additions to the Precedents. The notes which have been added in that portion of the Volume, which was the work of the late Editor, and which extends to page 85, are distinguished by brackets.

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Under-lease, by a Person holding under a renewable Lease, comprising other Property, to two Lessees, for ten Years and three Quarters, wanting two Days. Special Reservation of Rent for the three Quarters, wanting two days. (Variation where a nominal Rent only is reserved). Joint and several Covenant by Lessees, to pull down old Buildings, and expend a certain Sum in new Buildings and Improvements, conformably to a Plan—to keep the demised Premises, with the Improvements, in Repair—to pay a certain Sum to the Lessor, on his (the Lessee's) Assigning or Under-letting, &c. Covenant by Lessor to pay the Rent and perform the Covenants of the original Lease, and indemnify the Lessee therefrom; —Lessee to be entitled to deduct out of his Rent any Payments he may be called upon to make;—Power of Distress on the Lessor's other Property, by way of further Indemnity. Covenant by Lessor to procure Renewal of original Lease, and to grant an Under-lease to the present Lessee, on such Renewal; but Under-lessee to be at liberty to obtain a Lease immediately from the superior Landlord.—Covenant by Lessor to produce original Lease. - *Page* 485 — Under-lease, with special provisions for the indemnity of the lessees, and as to renewal, &c.

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Building Under-lease containing, with usual Clauses, special Proviso for Re-entry, in case the Buildings should not be erected, or should be suffered to be out of Repair, after Damages for Non-repair shall have been twice recovered in a Court of Law.—Covenant by Lessee to build according to a Plan, and prescribing the Dimensions, Materials to be used, &c.; also to pave Footways, make Drains, contribute towards the — Building under-lease.

Expense of Lighting, &c.—That House shall not be altered. Covenants by the Lessor, for Title—also to indemnify the Lessee from the original Rent, and authorizing him to reimburse himself any Monies he may be called upon to pay on account thereof, out of the Sub-rent, &c.—That the Lessee may dig Clay for Bricks, to be used in Building. - *Page* 509

From year to year of a farm. Short Demise from Year to Year of a Farm, containing Directions as to the Mode of Husbandry, &c. - 522

Of a farm under a power. Lease of a Farm, under a Power in a Settlement, containing the usual Exceptions of Timber, Mines, &c. Reservation of Right to kill Game, (and other Provisions relating thereto), with the ordinary Clauses relating to the Cultivation and Management of the Land, with Variations. - - - - - 526

Of a farm in Norfolk, with liberty of purchasing the fee. Lease of a Farm in Norfolk, containing (*inter alia*) Covenant by Lessee to occupy Farm personally, and not to be concerned in any other Farm.—Clause of Re-entry in case of Bankruptcy, &c.—Special Covenant as to Repairs: to keep a Dog for Landlord, and do certain Work for him.—Rather special Provisions respecting the Management of the Farm, and Course of Husbandry: Preservation of Fences, &c.—Liberty to Landlord to enter in the last Year of the Term, to sow Seeds, &c. Also during the Term to take a certain Portion of Land for Planting.—Lessee not to assign or under-let; to deliver Notices respecting Game, &c.—Joint and several Covenant by Lessee and Surety for Performance of Covenants by Lessee. —Covenant by Lessor to repair Buildings; to allow rough Wood for Repairs; to pay for Grass left at the End of the Term, and last Year's Hay and Turnips, &c.—Tenant to occupy Barn till 1st of May after End of Term, and to be at Liberty to purchase the Inheritance on certain Terms, within a given Period. 541

Under-lease for tithes. Under-lease of Tithes of certain Lands to the Occupier of

such Lands, for seventy-nine Years, determinable with the Life or Incumbency of the Rector, the original Lessor. - - - - *Page* 553

Lease by a Rector to the Occupiers of Land within the Parish, of the Tithes of their respective Lands, at Rents equal to the estimated Value of such Tithes, determinable by Notice on Non-payment of Rent, and also on the respective Lessees ceasing to be Occupiers of Lands in the Parish, unless the Lands come into the Occupation of other Lessees. - - 556 — Lease of tithes by a rector.

Lease by Trustees for a Wife's separate Use, in which a Mortgagee and the Husband and Wife join, for fifty Years, if the Wife should so long live. *Reddendum* to the Mortgagee, subject to the Equity of Redemption, and subject to a Proviso, that the Rent shall be paid to the Trustees, until Notice by the Mortgagee to the Lessee; that the Trustees' Receipts, until such Notice, shall be good Discharges. Power of Distress to Trustees. Covenant by the Lessee to pay the Rent to the Trustees till Notice, and afterwards to the Mortgagee. - - - 561 — By mortgagor and mortgagee.

ADDENDUM.

Page 160, line 6 from the bottom, before the word "remainder-man," read "contingent."

PRECEDENTS

IN

CONVEYANCING.

COVENANT.

TO PRODUCE TITLE-DEEDS, AND DELIVER ATTESTED COPIES, &c.

COVENANT *to produce* TITLE-DEEDS (*a*), *mentioned in a Schedule; not to wilfully deface, cancel, or obliterate any of the Deeds; and, on the Receipt or Tender of Sixpence for every Seventy-two Words of every Copy of the Deeds, in addition to the Stamp-duty, and the Expense of Paper, to deliver Attested Copies, or Extracts, or Abstracts.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part: WHEREAS, by indenture of lease bearing date the day next before the day of the date of these presents, and by indenture of release, bearing even date with these presents, and made between the said [*vendor*], and also [*trustees*], of &c., of the first part; the said [*purchaser*], of the second part; and [*trustee to prevent dower*], of the third part; *All that* close or parcel of ground, called or

Parties.

Recital of lease and release, to uses and trusts for the benefit of a purchaser, his appointees, heirs, and assigns.

(*a*) See a Covenant to produce *one* Deed, *ante*, Vol. 2, p. 26.

A purchaser is entitled to attested copies of the title-deeds, and a covenant to produce the originals when there is no contrary stipulation. *Ante*, Vol. 1, p. 85, n. (*m*).

As covenants for production of title-deeds are notice of dormant incumbrances, the modern practice generally is, to take such covenants in one or more separate deeds. *Vide post*, p. 10, n. (*a*).

TO PRODUCE TITLE-DEEDS, AND DELIVER ATTESTED COPIES, &c.

known by the name of G. Close, containing by estimation —— acres (more or less), situate, lying, and being in C. in the county of Middlesex, formerly in the tenure or occupation of J. L., afterwards of T. B., since of J. R., his under-tenants or assigns, and now or late of T. B., with the appurtenances, have, for the consideration expressed in the now reciting indenture of release, been conveyed and assured by the said [*vendor*], [*trustee*], and [*trustee*], *To the uses*, upon the trusts, and for the ends, intents, and purposes, in the said indenture of release declared of and concerning the same; such uses and trusts being for the benefit of the said [*purchaser*], his appointees, heirs, and assigns: AND WHEREAS the deeds, papers, and writings enumerated in the schedule hereunto annexed, or hereunder written, and now in the custody or power of the said [*vendor*], relate to, or concern, the said close and hereditaments hereinbefore mentioned, jointly and together with other property late of [*ancestor*], and [*another person*], and now of the said [*vendor*], and [*trustees*], as the trustees of her will, which is of greater value than the said close and hereditaments mentioned or described in the recital hereinbefore contained: *And*, on that account, the same deeds, papers, and writings, are to remain in the custody, possession, or power of the said [*vendor*], subject to the covenant hereinafter mentioned, for the production of the same deeds, papers, and writings, and for the other purposes hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, and the said [*vendor*], for himself, his heirs, executors, and administrators, doth, by these presents, covenant, promise, and agree, to and with the said [*purchaser*], his appointees, heirs, and assigns, in manner following, that is to say, That he the said [*vendor*], his heirs, executors, administrators, or assigns, (unless hindered or prevented by fire, or some other inevitable accident (*b*), or other accident which may happen to

Recital that deeds enumerated in schedule relate to premises sold jointly with other property;

and therefore they are to remain in vendor's custody, subject to covenant for production.

Testatum.

Covenant to produce deeds mentioned in schedule.

(*b*) *Vide ante*, Vol. 1, p. 3; Vol. 3, p. 556.

On loss of deeds by mortgagee, payment and reconveyance decreed, with an indemnity.

Under a bill of foreclosure by a devisee of a mortgagee, the mortgage deed being lost, a reconveyance was directed with an indemnity, and costs against the plaintiff, the suit being occasioned by the loss of the deed. *Stokoe* v. *Robson*, 3 Ves. & Bea. 51; 19 Ves. 385.

the deeds, papers, and writings mentioned or enumerated in the schedule hereunder written, or hereunto annexed,

TO PRODUCE TITLE-DEEDS, AND DELIVER ATTESTED COPIES, &c.

Upon a bill of foreclosure, the mortgagee having been robbed of the title-deeds, payment of the mortgage money within a limited time was decreed; and on payment of the same a reconveyance was directed, with a bond from the mortgagee to the mortgagor to indemnify against all costs, damages, &c., respecting future demands of the mortgage money and interest. *Shelmardine* v. *Harrop*, 6 Madd. 39. And see *Smith* v. *Bicknell*, 3 Ves. & Bea. 51, (*b*).

CASE, WITH THE OPINION OF ONE OF THE KING'S COUNSEL.

"CASE.

Case. Mr. W. agreed with Mr. A. to sell him a small piece of land; and that he should have immediate possession, which was taken accordingly; and it was further agreed between them, that the deed which conveyed such piece of land, and also other land of superior value, the property of the vendor, should not be delivered to the purchaser, but remain in the hands of the vendor. After this agreement, and possession taken by the purchaser, and on his solicitor attending to complete the purchase, it was discovered that such deed, which had been left in the hands of the vendor's solicitor, had become lost, or mislaid; and every endeavour to find it has at present proved fruitless. The vendor's solicitor is in possession of a copy, and would make an affidavit of the loss of the deed whilst in his custody; and also that the small piece of land sold to Mr. A. has not been mortgaged, or otherwise incumbered by the vendor. A copy of the deed would be given to the purchaser, and the vendor would covenant for the production of the original, as it is conceived it will at no very distant period be discovered somewhere.

The purchaser is a willing one; and would complete his purchase, if Mr. ——— should be of opinion he may safely do so. The purchase money is only 157*l.* 10*s.*"

"OPINION.

Opinion. If the purchaser is satisfied that the deed really is lost, he may safely complete his purchase; but the want of the deed may lead to difficulty, in case of a resale; although I apprehend, that, if the loss of the deed, and its contents, are satisfactorily proved, a purchaser would be compelled to take the title. The proposed affidavit should be made, and the purchaser may reasonably require a bond of indemnity from the seller.

Lincoln's Inn, 1*st Dec.* 1821."

[As to the loss of title-deeds after contract for sale, *vide post*, Vol. 7, p. 396.]

TO PRODUCE TITLE-DEEDS, AND DELIVER ATTESTED COPIES, &c.

while the same deeds, papers, and writings, shall be kept by the said [*vendor*], his heirs, executors, administrators, or assigns, or other person or persons entitled to the custody thereof, as he or they shall keep his or their own deeds, papers, writings, or other valuable effects)—shall and will, at any time or times, and from time to time hereafter, on every reasonable request in writing, and at the costs and charges in all things, of the said [*purchaser*], his appointees, heirs, or assigns, produce and shew forth, or cause or procure to be produced and shewn forth in England, and not elsewhere, unto the said [*purchaser*], his appointees, heirs, or assigns, or his or their attorney, solicitor, agent, or counsel, or to any other person or persons, whom the said [*purchaser*], his appointees, heirs, or assigns, shall direct or appoint; or to or before any court or courts of law, or equity, or at or upon any trial or trials, hearing or hearings, commission or commissions for the examination of witnesses, or otherwise, as occasion shall be or require,—the several deeds, papers, and writings, mentioned or enumerated in the schedule hereunder written, or hereunto annexed, or any or either of the same deeds, papers, and writings, for the proof, manifestation, support, or defence of the title of the said [*purchaser*], his appointees, heirs, or assigns, of, in, or to the said close and hereditaments: And the said [*vendor*], his heirs, executors, administrators, or assigns, or other the person or persons having the custody of the said deeds, papers, and writings respectively, shall not nor will at any time wilfully deface, cancel, or obliterate the same deeds, papers, and writings, or any one or more of them: And also, that he the said [*vendor*], his heirs, executors, administrators, or assigns, from time to time, when thereunto requested, and unless hindered or prevented by fire or other inevitable accident, as aforesaid, *and on the receipt or tender of sixpence for every seventy-two words of every copy of the same deeds, papers, and writings, or any of them respectively, besides and in addition to the stamp-duty then payable in respect of such copies, and the expense of the paper on which the same shall be written, shall or will give or deliver to the said [*purchaser*], his appointees, heirs, or assigns, a fair, true, neat, and attest-

Not to wilfully deface, cancel, or obliterate, any of the deeds:

and on the receipt or tender of sixpence for every seventy-two words of every copy of the deeds, in addition to the stamp-duty, and the expense of paper, to deliver attested copies, or extracts, or abstracts.

[*5]

ed copy of the same deeds, papers, and writings respectively, or any extracts from, or abstracts of the same, or any of them, and suffer such copies, extracts, and abstracts respectively, to be examined, and compared with the originals, either by the said [*purchaser*], his appointees, heirs, or assigns, or any person or persons whom he or they shall appoint. IN WITNESS, &c.

TO PRODUCE TITLE-DEEDS, AND DELIVER ATTESTED COPIES, &c.

THE SCHEDULE to which the above-written indenture refers. Schedule.

10*th and* 11*th Feb.* 1762.—Indentures, &c. *ut ante*, Vol. I. p. 2, *mutatis mutandis.*

[6]

COVENANT *by a Vendor with a Purchaser,* TO PRODUCE TITLE-DEEDS, *and to make and deliver Copies at the Purchaser's Expense: with a* PROVISO *for ceasing the Covenant, on the Vendor obtaining a like Covenant from a subsequent Purchaser: A Variation containing Part of a Covenant by two Persons for the Production of* TITLE-DEEDS, *each as to the Deeds in different Schedules: And a* VARIATION, *containing an* ADDITIONAL COVENANT *by a Tenant for Life in Possession, that his Executors shall, on his Decease, if Tenant for Life in Remainder should survive him, deliver the Title-deeds to the Purchasers of the Estate for Life in Remainder, On Condition that the Purchasers covenant to deliver the Deeds, on the Death of the Tenant for Life in Remainder, unto the Person then entitled to the Lands.*

TO PRODUCE TITLE-DEEDS, AND DELIVER COPIES, WITH PROVISO FOR CESSER.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*vendor*], of &c., of the first part; and [*purchaser*], of &c., of the second Parties.

TO PRODUCE TITLE-DEEDS, AND DELIVER COPIES, WITH PROVISO FOR CESSER.

part: WHEREAS, by indenture of lease, bearing date the day next before the day of the date of these presents, and by indenture of appointment and release, bearing even date with these presents, the indenture of appointment and release being made between the said [*vendor*], of the first part; [*vendor's trustee to prevent dower*], of &c., of the second part; and the said [*purchaser*], of the third part, *All that* close of land, situate &c., with the appurtenances, have been conveyed and assured unto and to the use of the said [*purchaser*], his heirs, and assigns, for ever: AND WHEREAS the several deeds, evidences, and writings, spe-*cified in the schedule hereunder written, or hereunto annexed, relate as well to the said hereditaments comprised in the said recited indentures of lease, and appointment and release, as to other hereditaments of greater value belonging to the said [*vendor*]: AND WHEREAS upon the treaty for the said purchase by the said [*purchaser*], it was agreed that all the said deeds, evidences, and writings comprised in the said schedule, should remain in the custody and possession of the said [*vendor*], his heirs, or assigns; and that he the said [*vendor*] should enter into the covenant hereinafter contained for the production thereof. NOW THIS INDENTURE WITNESSETH, that, in pursuance and performance of the said agreement, he (*a*)

Recital of lease, appointment and release to a purchaser in fee.

—That deeds in schedule relate to land conveyed, and other lands of greater value.

[*7]

—That the deeds should remain in vendor's custody, and that he should covenant for their production.

Covenant to produce title-deeds, on request, and notice in writing.

(*a*) *Lien part of a covenant by two persons, for the production of title-deeds, each as to the deeds in different schedules.*

Lien part of covenant by two persons for production of deeds, each as to the deeds in different schedules.

He, the said [A. B.], doth hereby, for himself, his heirs, executors, and administrators, and as to, for, and concerning only the deeds, papers, and writings mentioned in the first schedule to these presents, and the acts, deeds, and defaults relating thereto; AND THE SAID [C. D.] doth hereby for himself, his heirs, executors, and administrators, and as to, for, and concerning only the deeds, papers, and writings mentioned in the second schedule to these presents, and the acts, deeds, and defaults relating thereto, covenant, promise, and agree with and to the said [*purchaser*], his, &c.

Another Form.

AND THE SAID [A. B.], doth hereby for himself, his heirs,

TO PRODUCE TITLE-DEEDS, AND DELIVER COPIES, WITH PROVISO FOR CESSER.

the said [*vendor*], doth for himself, his heirs, executors, and administrators, covenant, promise, and agree, with and to the said [*purchaser*], his heirs, and assigns, that he the said [*vendor*], his heirs, and assigns, shall and will, from time to time, and at all times hereafter, upon every reasonable request, and notice thereof in writing for that purpose, given to him or them by the said [*purchaser*], his heirs, or assigns, or any person or persons lawfully or equitably claiming, or to claim any estate, right, title, or interest in or to the said hereditaments comprised in the said recited indenture of appointment and release, or any part or parts thereof, at the costs and charges of the person or persons requiring the same, produce and shew forth, or cause or procure to be produced and shewn forth, to him, them, or any of them, or to such person or persons as he or they shall desire or require, or at any trial, hearing, or examination in any court of law, equity, or other judicature, or upon the execution of any commission in England, as occasion shall be or require, all and every or any of the deeds, evidences, and writings, which are specified in the said schedule hereunder written, or hereunto annexed, for the manifestation, defence, and support of the estate, title, and possession of the said [*purchaser*], his heirs, or assigns, and all and every other person or persons claiming or to claim as aforesaid; AND shall and will, from time to time, and at all times hereafter, at the request, costs, and charges of the said [*purchaser*], his heirs, or assigns, or any other person or persons claiming or to claim as aforesaid, make, or cause to be made and delivered to the said [*purchaser*], his heirs, or assigns, or any other person or persons so claiming or to claim as aforesaid,

—To make and deliver copies at purchaser's costs.

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executors, and administrators, and as to and concerning only the acts, deeds, and defaults of himself, his heirs, executors, and administrators, and as to and concerning only, and as far as relates to the deeds, papers, and writings mentioned or specified in the first schedule hereunder written or hereunto annexed, AND THE SAID [C. D.], &c. (*the same as to* the deeds, &c. in the second schedule), covenant, &c.

TO PRODUCE TITLE-DEEDS, AND DELIVER COPIES, WITH PROVISO FOR CESSER.

such true and attested copies, or true copies unattested of the same deeds, evidences, and writings, as he or they may require (*b*); And shall and will, in the meantime, keep the same deeds, evidences, and *writings, whole, uncancelled, and undefaced, unless prevented from so doing by fire, or other inevitable accident: Provided always (*c*), *and it is hereby agreed and declared* between

—And in the interim keep the deeds uncancelled, &c.

[*9]

(*b*) *Additions to a covenant for production of title-deeds, where a tenant for life in remainder, subject to a previous life estate, sold his reversionary life estate, and the tenant for life in possession covenanted for the production of the title-deeds.*

Covenant by tenant for life in possession, that his executors shall, on his decease, if tenant for life in remainder should survive him, deliver title-deeds to purchasers of the estate for life in remainder, on *condition*, that purchasers covenant to deliver the deeds, on death of tenant for life in remainder unto the person then entitled to the lands.

And also that the executors or administrators of the said [*tenant for life in possession*] shall and will, on the demand of the said [*purchasers*], their heirs, or assigns, at any time after the decease of the said [*tenant for life in possession*], provided the said [*vendor, tenant for life in remainder*] should survive the said [*tenant for life in possession*], deliver, or cause or procure to be delivered unto the said [*purchasers*], their heirs, or assigns, *All* the said deeds, evidences, and writings particularly mentioned and set forth in the schedule hereunder written (unless prevented by fire or other inevitable accident); *On condition*, that the said [*purchasers*], their heirs, or assigns, do and shall thereupon, at the request, costs, and charges of the person or persons next immediately entitled to the said messuages or tenements, lands, hereditaments, and premises, in remainder or reversion, expectant on the decease of the said [*vendor, tenant for life in remainder*], covenant by deed to deliver, or cause to be delivered, the said deeds, evidences, and writings, immediately after the decease of the said [*vendor, tenant for life in remainder*], and demand made thereof, unto the person orpersons then entitled to the said messuages or tenements, lands, hereditaments, and premises, unless prevented by fire, or other inevitable accident; And also, that he the said [*tenant for life*], his executors, administrators, and assigns, shall and will, &c. *ut supra.* In witness, &c.

(*c*) This qualification of the covenant is generally introduced when the covenant is entered into by the assignees of a bankrupt, or other trustees,

and by the said parties to these presents, that, if the said [*vendor*], his heirs, or assigns, shall sell and dispose of such of the hereditaments to which the said deeds, evidences, and writings relate, as have not been sold by him to the said [*purchaser*] as aforesaid, or the greater part in value thereof, and shall thereupon, at *his or their own proper costs and charges, procure the purchaser or purchasers thereof to enter into the like covenant as is hereinbefore contained, to and with the said [*purchaser*], his heirs or assigns,—then and in such case, and immediately thereupon, the covenant hereinbefore contained shall cease and be void; any thing hereinbefore contained to the contrary thereof notwithstanding. IN WITNESS, &c.

TO PRODUCE TITLE-DEEDS, AND DELIVER COPIES, WITH PROVISO FOR CESSER.

Proviso for ceasing covenant to produce deeds, on vendor obtaining a like covenant from a subsequent purchaser.

[*10]

THE SCHEDULE to which the above written indenture refers.

Schedule.

COVENANT (*a*) *at the End of an Appointment and Release, on a Purchase,* TO PRODUCE THE TITLE-DEEDS; *and to deliver Copies, Abstracts, or Extracts; with a* PROVISO *for determining the Covenant, on the Vendor procuring a subsequent Purchaser, or Person entitled to the Custody of the Deeds, to enter into a similar Covenant.*

IN PURCHASE DEED, TO PRODUCE TITLE-DEEDS, DELIVER COPIES, PROVISO FOR CESSER, &c.

AND WHEREAS the deeds, evidences, and writings, mentioned in the schedule hereunder written, are in the cus-

Recital that deeds in schedule concern the

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or when the owner, after having sold one part of his estate, intends afterwards to dispose of the remainder; but it is not generally introduced in other cases.

(*a*) As covenants for the production of title-deeds are constructive notice of incumbrances, and, after a long interval, lead to an inquiry for deeds, &c., which have been converted into dust or ashes, the safe practice is, and, in most cases, it is the general practice in modern times, to

As covenants for production of title-deeds, give notice of dormant incum-

IN PURCHASE DEED, TO PRODUCE TITLE-DEEDS, DELIVER COPIES, PROVISO FOR CESSER, &c.

tody or possession of the said [*vendor*]; and do concern the title, not only of the said manor and other hereditaments, hereinbefore described, and expressed to be hereby appointed and released, but also of divers other hereditaments of or belonging to the said [*vendor*], of greater value; *And* it was therefore agreed, upon the treaty for the aforesaid purchase, that the same deeds, evidences, and writings, should remain in the custody of the said [*vendor*], upon his entering into such covenant for the production thereof as hereinafter mentioned. NOW THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of the said last-mentioned agreement, and for the considerations hereinbefore expressed, the said [*vendor*], for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree, with and to the said [*purchaser*], his appointees, heirs, and assigns, that he the said [*vendor*], his heirs, executors, administrators, or assigns, or some or one of them, shall and will (unless prevented by fire or other inevitable accident), from time to time, and at any time or times hereafter, upon every reasonable request, and at the proper costs and charges of the said [*purchaser*], his appointees, heirs, or assigns, or any of them, produce, and shew forth, or cause or procure to be produced and shewn forth, to the said [*purchaser*], his appointees, heirs, or assigns, or to such person or persons as he or they shall direct, or at any trial, hearing, or examination in any court of law, or equity, or other judicature, or upon the execution of any commission in England, as occasion shall require, the several deeds, evidences, and writings, mentioned and specified in the schedule hereunder written, and every or any of them; AND deliver, or cause to be delivered, unto the said [*purchaser*], his appointees, heirs, or assigns, or to whom he or they shall direct, true and

title of manor, &c. conveyed, and other premises of greater value:

that title-deeds should remain in vendor's custody on his covenanting for their production.

Further testatum.

Covenant to produce title-deeds:

to deliver copies, abstracts, or extracts:

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brances, the modern practice generally is to take such covenants in one or more separate deeds.

take the covenant in a *separate instrument*. And cases exist, in which it is prudent to take several deeds of covenant for the production of the evidence of title, each deed containing a different series; so that one of the covenants may be given over to a future purchaser, without any notice of deeds, which had better, even for the sake of such purchaser, be kept out of view. 1 Pres. Abs. 28, 153; Sug. Vend. 449, 6th Ed.

attested copies, or true copies unattested, or abstracts of, or extracts from, all and every or any of the same deeds, evidences, and writings, for the manifestation, support, and defence of the title of the said [*purchaser*], his appointees, heirs, or assigns, or any of them, to the said manor and other hereditaments hereinbefore described, and hereby appointed and released, or intended so to be, or any of them, or any part or parts thereof, with the appurtenances.

IN PURCHASE DEED, TO PRODUCE TITLE-DEEDS, DELIVER COPIES, PROVISO FOR CESSER, &c.

PROVIDED ALWAYS, *and it is hereby declared and agreed*, that, in case the several deeds and writings mentioned in the schedule hereunder written, or any of them, shall be delivered to, or shall come into the possession of any person or persons seised of, or beneficially entitled to such of the hereditaments to which the same relate, as are not by these presents assured, or any part thereof, or of any person or persons otherwise entitled to the custody of the same deeds and writings, or any of them, and if the said [*vendor*], his heirs, executors, administrators, or assigns, or any of them, shall cause or procure the person or persons to whom such deeds and writings, or any of them, shall be so delivered, or who shall so become or be possessed thereof, as aforesaid, to enter into a deed or deeds of covenant, similar to that hereinbefore contained for the production of the said deeds and writings, or such of them as shall be so delivered, or of which such possession shall be so had or obtained, as aforesaid, and shall cause such deed or deeds of covenant to be delivered to the said [*purchaser*], his appointees, heirs, or assigns (without any expense to him or them in respect thereof), *Then*, and in such case, immediately after such delivery of the same deed or deeds of covenant, the covenant hereinbefore contained, for the production of the same deeds and writings, shall, —as to such of the same deeds and writings as shall be so delivered, or of which such possession shall be so had or obtained, as aforesaid, but no further or otherwise, cease, determine, and become void; any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. IN WITNESS, &c.

Proviso for determining covenant to produce title-deeds, &c. on vendor procuring subsequent purchaser, or person entitled to custody of deeds, to enter into a similar covenant.

THE SCHEDULE to which the above written indenture refers. Schedule.

FOR PRODUCTION OF TITLE-DEEDS FROM ONE PURCHASER TO ANOTHER, WITH PROVISO FOR CESSER.

COVENANT *by* one Purchaser with another, *for the* PRODUCTION *of the* TITLE-DEEDS *relating to the Lands purchased by each of them; and to keep the Deeds safe; with a* PROVISO *for determining the Covenant, if the Covenantor should sell the Lands purchased by him, and procure the Purchaser to enter into the like Covenants as are herein contained; but without Prejudice to any Action which shall have accrued prior to the Delivery of the new Deed of Covenant.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—; BETWEEN [*covenantor*], of &c., of the one part; and [*covenantee*], of &c., of the other part.

Recital of conveyance to covenantor;

WHEREAS the said [*covenantor*] hath lately purchased the absolute estate of inheritance in fee-simple of and in *All that* cottage, &c., and the same have been accordingly conveyed and assured, *To the use* of him the said [*covenantor*], his heirs, and assigns, for ever:

and conveyance to covenantee:

AND the said [*covenantee*] hath also lately purchased the absolute estate of inheritance of and in the forecrop of *All* &c., and the same hath been accordingly conveyed and assured, *To the use* of him the said [*covenantee*], his heirs, and assigns, for ever.

that deeds mentioned in schedule have been delivered to covenantor; and that they relate as well to the premises purchased by covenantee, as to those purchased by covenantor.

AND WHEREAS the deeds, evidences, and writings comprised or mentioned in the schedule hereunder written, have been delivered to the said [*covenantor*]; *And* the same deeds, evidences, and writings, relate as well to the said forecrop purchased by the said [*covenantee*] as aforesaid, as to the said cottage, &c., purchased by the said [*covenantor*], as aforesaid.

Agreement upon purchase, for production of deeds.

AND WHEREAS, upon the treaty for the said purchases, it was agreed, that the said deeds, evidences, and writings should be produced from time to time, for the benefit of the said [*covenantee*], his heirs and assigns, in the manner hereinafter mention-

FOR PRODUCTION OF TITLE-DEEDS FROM ONE PURCHASER TO ANOTHER, WITH PROVISO FOR CESSER.

ed. NOW THIS INDENTURE WITNESSETH, and the said [*covenantor*], for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree, with and to the said [*covenantee*], his heirs, and assigns, That he the said [*covenantor*], his heirs, executors, administrators, or assigns, shall and will, unless prevented by fire, or some other inevitable accident, from time to time, and at all times hereafter, at and upon every reasonable request or notice in writing, in that behalf to be made and given by the said [*covenantee*], his heirs, executors, administrators, or assigns, produce and shew forth, or cause and procure to be produced and shewn forth, to the said [*covenantee*], his heirs, executors, administrators, or assigns, or any of them; or to his, their, or any of their counsel, agents, or attornies; or at any trial, hearing, commission, or examination in any court or courts of law or equity in Great Britain, all and every or any of the deeds, evidences, and writings which are mentioned or comprised in the schedule hereunder written, when and so often as there shall be occasion to inspect or produce the same, for the maintenance, manifestation, making out, defending, or proving the estate, interest, right, title, property, or possession of him the said [*covenantee*], his heirs, or assigns, or of any other person or persons in trust for him, them, or any of them, in and to the said forecrop, &c., so purchased by him the said [*covenantee*] as aforesaid, or any part thereof: AND shall and will, in the meantime, keep and preserve the said deeds, evidences, and writings, safe, whole, uncancelled, and undefaced (all losses and damages by fire, or other inevitable accident, as aforesaid, only excepted). PROVIDED ALWAYS, *and it is hereby agreed and declared* by and between the said parties to these presents, to be their, and each of their, true intent and meaning, that, if the said [*covenantor*], his heirs, or assigns, shall be minded and desirous to sell and dispose of the said cottage, &c. purchased by him as aforesaid, and shall really and *bonâ fide* sell and alien the same, and at his or their own costs and charges shall procure the purchaser or purchasers thereof to enter into the like covenants as are hereinbefore contained, to and with the said [*covenantee*], his heirs, and assigns, and the same, being

Testatum.

Covenant to produce title-deeds;

and to keep the deeds safe.

Proviso for determining the covenant, if covenantor should sell his premises, and procure the purchaser to enter into the like covenants as herein contained:

FOR PRODUCTION OF TITLE-DEEDS FROM ONE PURCHASER TO ANOTHER, WITH PROVISO FOR CESSER.

duly executed in the presence of two or more credible witnesses, shall deliver, or cause to be delivered to the said [*covenantee*], his heirs or assigns,—*Then* the covenants and agreements hereinbefore contained shall (*subject* and without prejudice to any action or actions, cause or causes of action, which shall have accrued under the same covenant or covenants respectively, prior to the delivery of the same deed of covenant to the said [*covenantee*], his heirs or assigns), thenceforth cease, determine, and become void; and these presents shall be delivered up to the said [*covenantor*], his heirs, executors, or administrators, to be cancelled (*a*); any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. IN WITNESS, &c.

but without prejudice to any action which shall have accrued prior to the delivery of the new deed of covenant.

MR. H. ATHERTON'S FORM.

Covenant not to conceal, destroy, or part with deeds to any person, until such person shall covenant to produce the deeds as aforesaid:

AND that he the said [*covenantor*], his heirs, executors, or administrators, shall not nor will conceal, destroy, or wilfully part with the said indentures, deeds, and writings, out of his or their custody or power, to any person or persons whomsoever, until the person or persons into whose custody the same shall be delivered, shall duly enter into covenants to produce and shew forth the same, in manner and for the purposes aforesaid: AND shall and will, in the meantime, preserve and keep the same indentures, deeds, and writings whole, uncancelled, and undefaced, unless the same shall be destroyed by fire, or other inevitable accident.

and in the interim keep the deeds whole, uncancelled, and undefaced.

Schedule.

THE SCHEDULE to which the above-written indenture refers.

(*a*) A bond or deed of covenants may become void by intentional cancellation by the person beneficially entitled. *Ante*, Vol. 2, p. 43.

BY VENDOR, TO PRODUCE TITLE-DEEDS COVENANTED TO BE PRODUCED TO HIM.

COVENANT *at the End of an Appointment and Release, for* PRODUCTION *of* TITLE-DEEDS, *&c., where the Vendor, having a Covenant for Production of the Title-deeds to his Estate, sells only part of the Estate, and retains his Purchase-deed, which contains the Covenant to produce the Deeds; with a* PROVISO *that if, upon any Demand made by the Purchaser on the Vendor, under his Covenant for quiet Enjoyment, as against the original Vendors; or under the Vendor's Covenant for Production of the Title-deeds,—the Vendor should deliver to the Purchaser the original Deed, to enable him to avail himself of the Covenants therein contained on the part of the original Vendors; and should concur in any Act for enforcing the Performance of any of the Covenants on the Part of the original Vendors, for the Production of the Title-deeds; or for obtaining Damages, on Breach of any of the Covenants on the part of the original Vendors; and for indemnifying the Purchaser in respect of any Loss, &c. on account of the original Covenants,—Then the Purchaser shall not commence any Action, &c. against the Vendor, on the Covenant herein contained for the Title, &c. as against the original Vendors; or on the Covenant herein contained on the part of the Vendor for Production of the Title-deeds; and that the Vendor shall not, in any such case, be liable to any Loss, &c. in respect of any Acts of the original Vendors* (*a*).

Covenant to produce title-deeds, &c.

AND THIS INDENTURE FURTHER WIT-

(*a*) The above proviso, &c. were drawn in pursuance of the following opinion of the learned Fearne:—

BY VENDOR, TO PRODUCE TITLE-DEEDS COVENANTED TO BE PRODUCED TO HIM.

NESSETH, that, &c. *covenant from the vendor to* produce the several deeds, &c. mentioned in the sche-

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"The only difference in opinion upon this case arises, I apprehend, from the retention by Mr. Q. of the deeds of conveyance to him; for, if those deeds went with the title to the present vendee, I conceive there could be no requisition on his part of the covenants now in question.

"Regularly, a vendor who purchases lands himself, with proper covenants from those who convey to him, cannot reasonably be required to covenant further than against himself, and those claiming under him. This is a practice founded in reason, where the vendee obtains the full benefit of all the covenants in the conveyance to the vendor to the same extent as his vendor has them, by obtaining the possession of the deeds containing those covenants. When the vendor has parted with his means of claim or remedy against his grantor for breach of his covenants, and transferred them to the purchaser, by delivery of the deeds, and such vendee comes into the vendor's place in that respect, by the acquisition of such deeds, it would be unreasonable that the vendor should make *himself liable* for any such breach. He, by departing with the means of remedy or compensation, must be understood to have discharged himself from, and the vendee, by accepting those means, to have taken upon himself the peril or risk of such breach, and the duty of enforcing its remedy or compensation.

"But this principle, I think, does not apply to those cases where the vendor does not depart with, or the vendee acquire the deeds containing the covenants for the title against the acts of such grantors. Whilst the vendor retains in his own hands the immediate means of indemnity which he thought proper to require of his grantor, it seems but reasonable that he should engage for the like indemnity to his own vendee, and rely upon the indemnity he has retained for his own counter-security. It is not, I think, sufficient to say, that the covenant to produce his purchase-deeds will entitle the vendee to the benefit thereof, when produced. Such covenant cannot insure the production of them, which may be prevented by accidents, for which the vendor, in whose custody the deeds are, ought to be the sufferer, rather than the vendee, who, by not having such possession, could not, in any degree, be accessary to the occasion of their loss, or by any means or care have prevented it. There seems more reason, on the other side, to say, it is sufficient for the vendor, that, when called upon by the covenants entered into by him to the vendee for enjoyment, &c., he has his remedy over to the same extent upon the grantors, of which, as he retains the means in his own custody, he is bound to look to the preservation of those means, and liable to the re-

dule, &c., and deliver copies, &c., *ut supra:* PROVIDED ALWAYS, *and it is hereby agreed and declared* between

BY VENDOR, TO PRODUCE TITLE-DEEDS COVENANTED TO BE PRODUCED TO HIM.

Proviso, that if, upon any de-

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sort to, and due enforcement of them, and to bear the consequence of their loss.

"Upon the whole, therefore, the present case does not appear to me to fall within the general rule, where the vendee acquires the custody or possession of the vendor's purchase-deeds; and that it is but reasonable that a vendor, retaining in his own custody the only means of indemnity against the acts of his grantors, should engage to indemnify his vendee to the like extent. He cannot, I think, fairly object to his vendee's requiring an indemnity against the acts of the same persons, and to the same extent as he himself required; nor, whilst he retains the means of enforcing such indemnity, deny his reliance upon, or refuse to subject himself to a resort to those means. Withholding his own indemnity from the possession of the vendee, it is but fair he should give him the possession of an equivalent one. I therefore think Mr. Q. may be required to covenant for quiet enjoyment to the extent required on the part of the vendee, subject to such a qualification as I shall afterwards mention.

"The same principle, I think, applies to *the covenant for the production of the title-deeds.* Where a vendor retains to himself the title-deeds, or the means of resorting to and obtaining their production, it seems but reasonable that he should covenant for their production to his vendee; for though the deed itself, containing the covenant for production of them from the grantors of the vendor, if it extends to his assigns, as usual, would, when obtained by the vendee, I think, entitle him to the benefit of such covenant, as well as of the other covenants extending to assigns, so far as respects the parts purchased by him; yet, to avoid all question on this point, and leave the risk attending the loss of the means of enforcing such covenants on the person retaining the custody of those means, I think, the purchaser may reasonably require a covenant from the vendor for the production of those title-deeds, to such an extent as the covenant in the vendor's purchase-deeds entitled him to the production thereof, unless he can procure a new covenant for that purpose from his grantors to the new purchaser. If it is right that a vendor retaining the title-deeds himself should covenant for their production, can it be otherwise that a vendor retaining in his own custody the means of obtaining their production, or a compensation in default thereof, should covenant to produce them to his vendee, in the manner and on the terms upon which he is so entitled to their production? Where is the difference between the vendor's retaining the possession of the title-deeds himself, and his retaining the right and means of obtaining that possession on any requisite occasion, in respect to his obligation to produce them on any such occasion to his vendee? Or why

mand made by purchaser on vendor under his covenant for quiet enjoyment,

and by the said parties hereto, and particularly the said [*purchaser*], for himself, his heirs, executors, and ad-

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should he refuse to covenant to produce them in one case more than in the other, unless he distrusts the means he has retained for obtaining the production of them himself? If he does so, that becomes an additional reason for still further caution in and security to his vendee. It therefore seems to me, that the vendor in this case retaining his own purchase-deed, which entitles him to the production of the scheduled title-deeds, may reasonably be required to enter into a similar covenant for producing the same deeds to his vendee.

"But at the same time that it seems reasonable that the vendee should be put as nearly as possible in the same state of security as if the vendor's purchase-deeds had gone with the title, it is equally fair that the vendor should not subject himself by his covenant farther than seems requisite to answer this end; and therefore, I think, the covenants now in question should be qualified by a proviso and agreement, including a covenant on the part of the vendee, at the end of the vendor's covenants, that in case upon any claim or demand made by the vendee, his heirs or assigns, upon the vendor, his heirs, executors, administrators, or assigns, under or by virtue of the covenant on the part and behalf of the vendor for quiet enjoyment, against the acts of Mr. O. and his wife, and her ancestors, or under or by virtue of the covenant entered into by the vendor for producing the title-deeds comprised in the covenant entered into with him by his said grantors, the said vendor, his heirs, executors, administrators, or assigns, shall produce and deliver to the said vendee, his heirs or assigns, the purchase-deeds from his grantors, in order to enable the vendee, his heirs or assigns, to avail himself of the covenants therein contained on the part of Mr. O. and his wife; and shall, at the costs and charges of the vendee, his heirs or assigns, concur in any deed or act that may be requisite for the enforcing the performance of any of such covenants, or obtaining the production of the said title-deeds, or any of them, against the said O. and his wife, and their representatives; or obtaining damages, upon breach of any of the covenants contained in the said purchase-deeds, from the said O. and his wife, by any action, suit, or other proceeding or means that the vendee, his heirs or assigns, may think proper for the purpose, so far as respects the lands purchased by the vendee; and for indemnifying him, his heirs or assigns, in respect of any such breach of those covenants so entered into by the said O.; that then, and in such case, the vendee, his heirs or assigns, shall not commence any sort of action, suit, or other proceeding against the vendor, his heirs, executors, administrators, or assigns, upon, under, or by virtue of the covenant by him entered into with the vendee for quiet enjoyment, as against the acts

ministrators, doth hereby covenant, promise, and agree with and to the said [*vendor*], his heirs, executors, and administrators, *That*, in case, upon any demand or claim which shall be made by the said [*purchaser*], his appointees, heirs, *or assigns, upon the said [*vendor*], his heirs, executors, or administrators, under or by virtue of the covenant hereinbefore contained on the part of the said [*vendor*], his heirs, executors, and administrators, for quiet enjoyment, as against the said [*two original vendors*], or either of them, or under or by virtue of the covenant hereinbefore contained for the production of title-deeds by the said [*vendor*], his heirs, executors, administrators, or assigns, the said [*vendor*], his heirs, executors, administrators, or assigns, shall produce and deliver unto the said [*purchaser*], his appointees, heirs, or assigns, the said recited indenture of release of the —— day of ——, 18—, in order to enable him the said [*purchaser*], his appointees, heirs, or assigns, to avail himself or themselves of the covenants therein contained on the part of the said [*two original vendors*], or either of them, their, or either of their heirs,

BY VENDOR, TO PRODUCE TITLE-DEEDS COVENANTED TO BE PRODUCED TO HIM.

as against original vendors, or under vendor's covenant for production of title-deeds—vendor shall deliver to purchaser original deed, to enable him to avail himself of the covenants therein contained, on the part of the original vendors:

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of Mr. and Mrs. O. or her ancestors, so far as it respects any such acts or deeds only, and not the acts or deeds of the vendor, or those claiming under him, or upon, under, or by virtue of the covenant entered into by the vendor for the production of the title-deeds covenanted to be produced by his grantor; and that the vendor, his heirs, executors, administrators, or assigns, shall not, in any such case, be liable to any loss, costs, charges, damages, or expenses, for or in respect of any acts or deeds of Mr. O. or his wife, or her ancestors; or for or in respect of the non-production of the title-deeds specified in the covenant from Mr. O. and his wife, or for any breach of the covenants entered into by the vendor in those respects only.

"A qualification, by an agreement of the above nature, I conceive, will remove every reasonable objection, on the part of the vendor, to the covenants now required on the part of the vendee."—Fearne's Posth. 110.

However, it is proper to state, that a respectable writer notices Mr. Fearne's opinion, and *as to the covenant to produce the title-deeds*, in such a case as the above, says, "I should conceive the practice to be, for the vendor to enter into the usual covenant for production of the title-deeds in his possession, which of course would include the original covenant to produce the deeds." Sug. Vend. 450, 6th edit.

BY VENDOR, TO PRODUCE TITLE-DEEDS COVENANTED TO BE PRODUCED TO HIM.

executors, or administrators, so far as the same covenants relate to or affect the premises hereinbefore described, and intended to be hereby conveyed and assured: AND ALSO shall and will, at the costs and charges of the said [*purchaser*], his appointees, heirs, and assigns, concur in any deed or act, that may be requisite for enforcing the performance of any of the said covenants in the said indenture of the —— day of ——, 18—, contained on the part of the said [*two original vendors*], or either of them, their, or either of their heirs, executors, or administrators, for obtaining the production of the title-deeds by the same indenture of release covenanted to be produced, or any of them; or for obtaining damages upon breach (*b*) of any of the covenants contained in the said recited indenture of release of the —— day of ——, 18—, on the part *of the said [*two original vendors*], or either of them, their, or either of their heirs, executors, or administrators, by any action, suit, or other proceeding or means, that he the said [*purchaser*], his appointees, heirs, or assigns, may think proper or advisable, so far as the same respect the said messuages or tenements, hereditaments, and premises hereinbefore described, and intended to be hereby conveyed and assured; and for indemnifying and saving harmless him the said [*purchaser*], his appointees, heirs, or assigns, in respect of any loss, costs, charges, damages, and expenses, which may arise, happen, or accrue in consequence, or on account of such breach of the said covenants, in the said indenture lastly mentioned and contained, on the part of them the said [*two original vendors*], or either of them, their, or either of their heirs, executors, or administrators, *Then*, and in such case, the said [*purchaser*], his appointees, heirs, or assigns, shall not nor will commence any sort of action, suit, or other proceeding

and shall concur in any act for enforcing the performance of any of the covenants, on the part of the original vendors, for production of the title-deeds,

or for obtaining damages on breach of any of the covenants on the part of original vendors:

[*22]

and for indemnifying purchaser in respect of any loss, &c. on account of the original covenants,

Then purchaser shall not commence any action, &c., against

(*b*) It seems, that a release by the covenantee before any breach, or before the suit commenced, would be a good bar to the assignee from bringing a writ of covenant. But if the breach of the covenant be in the time of the assignee, and the action be brought by him, it is so attached in his person, that the covenantee cannot release this action, wherein the assignee is interested. *Middlemore* v. *Goodall*, Cro. Car. 503.

against the said [*vendor*], his heirs, executors, administrators, or assigns, upon, under, or by virtue of the covenants hereinbefore contained on his or their parts for the title, right to convey, quiet enjoyment, and further assurance, as against the said [*two original vendors*], or either of them, or their or either of their acts or deeds (so far as respects them or either of them, and their or either of their acts or deeds only, and not the acts or deeds of the said [*vendor*], or those claiming under him); or upon, under, or by virtue of the covenant hereinbefore contained on the part of the said [*vendor*], his heirs, executors, and administrators, for the production of the title-deeds, in the said indenture of release of the —— day of ——, 18—, covenanted to be produced by the said [*two original vendors*]: And that the said [*vendor*], his heirs, executors, administrators, or assigns, shall not in any such case be liable to any loss, costs, charges, damages, or expenses for or in respect of any acts or deeds of the said [*two original vendors*], or either of them, their, or either of their heirs, executors, administrators, or assigns, or for or in respect of the non-production of the title-deeds, in and by the said recited indenture of release covenanted to be produced by *the said [*two original vendors*], or for any breach of all or any of the covenants hereinbefore contained in those respects only. In witness, &c.

BY VENDOR, TO PRODUCE TITLE-DEEDS COVENANTED TO BE PRODUCED TO HIM.

vendor, on the covenants herein contained for the title, &c., as against original vendors:

or on the covenant herein contained on the part of vendor, for production of the title-deeds:

and that vendor shall not in any such case be liable to any loss, &c., in respect of any acts of original vendors.

[*23]

THE SCHEDULE to which the above-written indenture refers.

Schedule.

NOT TO SUE SURETY, TILL NOTICE TO AND DEFAULT BY PRINCIPAL, AND NOTICE TO SURETY.

COVENANT *by three Bankers, with a Surety* (*a*), *that he shall not be liable to be sued on a Bond, unless the Principal shall neglect to pay the Monies secured by the Bond, for the space of* (*One Month*) *after Notice; nor unless the Surety shall neglect to pay the Monies after Three Months' Notice of such Neglect by the Principal* (*b*): COVENANT *by the Bankers with the Surety, to use their utmost Endeavours to obtain from the Principal Payment of the Monies secured by the Bond, before any Action shall be commenced against the Surety.* AND COVENANT *by the Principal with the Surety, to indemnify against all Actions, &c. by reason of the Surety having executed the Bond.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*three bankers*],

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(*a*) As to the rights and liabilities of SURETIES, *vide ante*, Vol. 1, p. 471, 504, 509; Vol. 3, pp. 192, 236, 240-1, 283, 298, 304.

A release to one of several obligors discharges the others.

(*b*) A release to one of several obligors, whether they are bound *jointly*, or *jointly and severally*, discharges the others, and may be pleaded in bar by all. 2 Roll. Abr. 412, (G.) pl. 4, 5; *Clayton* v. *Kynaston*, 2 Salk. 574. So, where the obligee *covenants* not to sue the obligor at all, he may plead it as a *release* to avoid a circuity of action. *Hodges* v. *Smith*, Cro. Eliz. 623; *Smith* v. *Mapleback*, *per* Buller, J., 1 Durnf. & East, 446; *Burgh* v. *Preston*, 8 Durnf. & East, 486. If the obligee covenants not to sue the obligor *for a certain time*, it does not amount to a defeazance, nor can it be pleaded as such, but is a *covenant* only, for a breach of which the obligor may bring his action. *Ayloffe* v. *Scrimpshire*, Carth. 63; 1 Show. 46; Comber. 123, 124; 2 Salk. 573, *S. C.* But where a bond was conditioned that the obligor should indemnify the obligee from all sums he should pay on the obligor's account; and, before the bond was executed, a memorandum was indorsed on it, which was part of the condition, that the

of &c., bankers and co-partners, of the first part; [*principal*], of &c., banker, of the second part; and [*surety*], of &c., gentleman, of the third part: WHEREAS the said [*principal*], and [*surety*], by their bond or obligation under their respective hands and seals, bearing date the —— day of —— instant, became jointly and severally bound to the said [*bankers*], in the sum of —— pounds, *Subject* to a condition thereunder written, whereby it was declared, *that if &c., *(recite the condition verbatim. Vide ante,* Vol. III. 237, 453, 463). AND WHEREAS the said [*surety*] joined in the said bond or obligation, at the instance and request, and as the surety of the said [*principal*], as he the said [*principal*] doth hereby admit and acknowledge; AND it was, previous to the execution thereof, agreed that the said [*bankers*] should make and execute such grant, covenants, and agreements, and that the said [*principal*] should also enter into such covenants and agreements as are hereinafter on their respective parts contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of such previous agreements, *it is hereby agreed and declared,* by and between the said parties to

NOT TO SUE SURETY, TILL NOTICE TO AND DEFAULT BY PRINCIPAL, AND NOTICE TO SURETY.

Recital of bond from principal and surety, to bankers:

[*25] suretyship:

previous agreement that bankers and principal should execute such covenants as herein contained.

Testatum.

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obligee *undertook* not to sue upon the bond until after the obligor's death, it was held that the bond was not payable by the obligor himself, but only by his representatives after his death; for the memorandum being *part of the condition,* differs it from the preceding case, where the agreement was a collateral one in a *different deed. Burgh* v. *Preston,* 8 Durnf. & East, 483. So, where two are bound jointly and severally, and the obligee *covenants* with one of the obligors only, not to sue him, it does not amount to a release, but is a *covenant* only, and the obligee may still sue the other obligor. *Lacy* v. *Kynaston,* 2 Salk. 575; 12 Mod. 551; 2 Lord Raym. 959, *S. C.* And the same point was determined in *Dean* v. *Newhall,* in which the Court held, upon the authority of *Lacy* v. *Kynaston,* that where an obligee *covenanted* not to sue one of two joint and several obligors, and, if he did, the deed of covenant might be pleaded in bar, he might still sue the other obligor. S. P. *Hutton* v. *Eyre,* 6 Taunt. 289; 1 Marsh. 603, *S. C.*

Where two are bound jointly and severally, and the obligee *covenants* with one of the obligors only, not to sue him, it is a *covenant* only, and the obligee may still sue the other obligor.

The general words of a release, as of any other deed, may be restrained by a particular recital or other part of the same instrument. *Taylor* v. *Homersham,* 4 Maule & Selw. 423; *Solley* v. *Forbes,* 2 Brod. & Bing. 38.

NOT TO SUE SURETY, TILL NOTICE TO AND DEFAULT BY PRINCIPAL, AND NOTICE TO SURETY.

these presents, and the said [*bankers*] do, and each of them doth hereby grant to the said [*surety*], his heirs, executors, and administrators; *And also*, jointly and severally for themselves and their respective executors and administrators, covenant and agree with the said [*surety*], his executors, and administrators, that, notwithstanding any thing contained in the said recited bond or obligation, or in the condition thereunder written, the said [*surety*], his executors, or administrators, shall not be subject or liable to any action or suit at law or in equity, upon, or by virtue of the said bond or obligation, *Unless*, or until the said [*principal*], his heirs, executors, or administrators, shall fail, neglect, or omit to pay the several principal monies, interest and other monies, in the said condition mentioned, or referred to, by the space of —— next after demand, or notice in writing shall have been given by the said [*bankers*], or the survivors or survivor of them, his executors, or administrators, or their or his partner or partners for the time being, to the said [*principal*], his heirs, executors, or administrators, or left at the place of his or their then last or most usual place of residence in England, requiring the said [*principal*], his heirs, executors, or administrators, to pay the person or persons entitled thereto, all the monies secured and made payable by virtue of the said bond and the condition thereunder written; *Nor unless* or until the said [*surety*], his heirs, executors, or administrators, shall fail, neglect, or omit to pay the several monies, interest, and other monies in the *said condition mentioned or referred to, by the space of three calendar months next after notice in writing shall have been given by the said [*bankers*], or the survivors or survivor of them, his executors, or administrators, or their or his partner or partners for the time being, to the said [*surety*], his executors, administrators, or assigns, or left at the place of his or their then last or most usual residence in England, of such neglect, failure, default, or omission of payment as aforesaid by the said [*principal*], his heirs, executors, or administrators: And that in case any such action or suit at law, or in equity, shall be commenced or instituted against the said [*surety*], his heirs, executors, or administrators, contrary to or in breach of

Grant and covenant by bankers to and with surety, that he shall not be liable to be sued on bond,

unless principal shall neglect to pay, for the space of —— after notice;

nor unless surety shall neglect to pay after three months' notice of such neglect by principal.

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And that in case of any proceedings against surety contrary to the grant, &c. herein contain-

NOT TO SUE SURETY TILL NOTICE TO AND DEFAULT BY PRINCIPAL, AND NOTICE TO SURETY.

the grant, covenant, or agreement hereinbefore in that behalf contained, *Then*, and in that case, these presents shall or may be pleaded in bar to such action or suit at law or in equity; And the said [*bankers*] do, and each of them doth hereby further, jointly and severally, for themselves, their respective heirs, executors, and administrators, covenant and agree with the said [*surety*], his executors, and administrators, that they the said [*bankers*], and the survivors and survivor of them, his executors, and administrators, and their partner or partners for the time being, shall and will use his and their respective utmost endeavours to obtain from the said [*principal*], his heirs, executors, or administrators, the payment of the monies secured by the said bond or obligation, before any action or suit whatsoever, at law or in equity, shall be commenced or instituted on the said bond or obligation against the said [*surety*], his heirs, executors, or administrators: And the said [*principal*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*surety*], his executors, and administrators, that he the said [*principal*], his heirs, executors, administrators, or assigns, or some of them, shall and will, at all times hereafter, at his or their own costs and charges, well and sufficiently protect, save harmless, and keep indemnified the said [*surety*], his heirs, executors, administrators, and assigns, and his and their respective lands, tenements, goods, and chattels, of, from, and against all actions, suits, losses, costs, charges, damages, and expenses *whatsoever which he or they, or any of them, shall or may suffer, sustain, expend, or be put unto, or which shall or may be commenced, instituted, sued, or prosecuted against him, them, or any of them, for, or by reason, or in consequence of the said [*surety*] having executed the said recited bond or obligation. In witness, &c.

ed, these presents may be pleaded in bar.

Covenant by bankers with surety, to use their utmost endeavours to obtain from principal, payment of monies secured by the bond, before any action shall be commenced against surety.

Covenant by principal with surety, to indemnify against all actions, &c. by reason of surety having executed bond.

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TO FIND LOST ASSIGNMENT OF ATTENDANT TERMS, OR PROCURE ASSIGNMENTS.

COVENANT (*a*) *by a Vendor, where several Terms had been assigned to a Trustee for him, to attend the Inheritance, but the Assignment had been lost or mislaid; and on a Sale the Terms had been assigned to a Trustee for the Purchaser, to attend the Inheritance,—to use his utmost Endeavours to find the lost Assignment, and, if found, to deliver it to the Purchaser; and, if not found within three Months, to procure such of the Premises comprised in the Terms as were conveyed to the Purchaser, to be assigned by the Persons by whom the Premises were assigned by the lost Assignment, or the Persons in whom the Residues of the Terms would, in case the lost Assignment had not been executed, have been vested, unto the new Trustee; and, in order thereto, to make such Representation as may be necessary, to any Persons, in whom the Premises have been, or if the lost Assignment had not been executed, would have been vested, for the Residue of the Terms.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*vendor*], of &c.,

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(*a*) See a *covenant* on a purchase, with a defective title, and an investment in the funds as an indemnity, to procure two terms to be assigned upon trust for a purchaser. *Ante*, Vol. 1, p. 125.

Covenant by a vendor to re-purchase premises, if required by the purchaser within a limited period, in case the title-deeds are not found in the mean time. *Ante*, Vol. 1, p. 126.

Bond from a vendor to a purchaser, to procure an assignment of an outstanding term. *Ante*, Vol. 3, p. 322.

And see further, title INDEMNITY, and INDEX to the PRECEDENTS, title DEEDS.

of the one part; and [*purchaser*], of &c., of the other part: WHEREAS *(recite that by the lease and release, bearing date, &c., the purchase-deed,* All that, &c. *were conveyed, &c., to uses to prevent dower, &c.*, ut ante, Vol. I. p. 652; *That the premises, or some part thereof, were subject to certain terms for years, created, &c.* (Vide Vol. I. p. 117); *That, by an indenture bearing date on or about the 24th day of June*, 1797, *the terms became vested in* [trustee]; *And that, by indenture of even date with the purchase-deed,* [trustee] *assigned the terms to* [new trustee], *In trust* for the said [*purchaser*], his appointees, heirs, and assigns, and to attend the reversion of the same premises (*vide ante*, Vol. II. p. 163): AND WHEREAS the said indenture of the 24th day of June, 1797, having been lost or mislaid, it was agreed, upon the treaty for the said purchase, by the said [*purchaser*], that the said [*vendor*] should enter into such covenant as hereinafter is contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance and performance of the said agreement, and in consideration of the premises, the said [*vendor*] doth for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said [*purchaser*], his appointees, heirs, and assigns, that he the said [*vendor*], his heirs, executors, or administrators, shall and will use his and their utmost endeavours to find the said indenture of the 24th day of June, 1797, which hath been so lost, or mislaid, as aforesaid; AND, in case of the same indenture being found, shall and will immediately thereupon, at his or their proper costs and charges, deliver, or cause or procure the same to be delivered to the said [*purchaser*], *his appointees, heirs, or assigns; AND FURTHER, that in case the said indenture of the 24th day of June, 1797, shall not be found within the space of three calendar months next after the date of these presents, then, and in such case, he the said [*vendor*], his heirs, executors, or administrators, shall and will, at his or their proper costs and charges, immediately after the expiration of the said three calendar months, cause or procure such of the hereditaments comprised in any of the said several terms of —— and —— years as were conveyed, or expressed to

TO FIND LOST ASSIGNMENT OF ATTENDANT TERMS, OR PROCURE ASSIGNMENTS.

Recitals.

Recital that, assignment of terms being lost, vendor agreed to enter into subsequent covenant.

Testatum.

Covenant by vendor to use his utmost endeavours to find lost assignment of attendant terms:

And, if found, to deliver it to purchaser:

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And if not found within three months, to procure such of the premises comprised in terms as were conveyed by lease and release, to be assigned by the persons by whom the premises were assigned by the

TO FIND LOST ASSIGNMENT OF ATTENDANT TERMS, OR PROCURE ASSIGNMENT.

be conveyed, by the hereinbefore in part recited indentures of lease and release, with their respective appurtenances, to be assigned by the respective persons by whom the same premises respectively were assigned, or expressed to be assigned, in and by the said indenture of the 24th day of June, 1797, or other the person or persons in whom the said residues of the said several terms of years of or in the same premises respectively, would, in case the said last-mentioned indenture had not been executed, have been vested by representation, or otherwise, unto the said [*new trustee*], his executors, administrators, or assigns, UPON and for the trusts, intents, and purposes, in and by the said indenture of assignment, of the —— day of —— last, expressed or declared of or concerning the same; AND, in order thereto, shall and will, at his or their like costs and charges, make, or procure to be made, such representation or representations as may be necessary, to any person or persons in whom the same premises, or any of them, have been, or are, or shall or may be, or, if the said indenture of the 24th day of June, 1797, had not been executed, would or might have been vested for the residue of any of the said several terms of years therein respectively. IN WITNESS, &c.

lost assignment, or the persons in whom the residues of terms would, in case lost assignment had not been executed, have been vested, unto new trustee;

And in order thereto, to make such representation as may be necessary, to any persons in whom the premises have been, or, if lost assignment had not been executed, would have been vested, for residue of terms.

BY VENDOR TO PAY A LEGACY, AND INDEMNIFY.

COVENANT (*a*) *by a Vendor to pay a Legacy charged on Lands conveyed, with other Hereditaments, when the Legacy shall become payable; and thereupon to procure and deliver a Release for the Legacy to the Purchaser; and indemnify the Purchaser and his Trustee to prevent Dower, and their Lands, &c. from the Legacy, and Interest; and from all Actions, &c. on Account thereof.* To follow the Covenant for further Assurance, in the Release in Fee.

Covenant by vendor, to pay legacy charged on lands conveyed, with other hereditaments, when legacy shall become payable.

AND MOREOVER that he the said [*vendor*], his heirs, executors, or administrators, shall and will well and truly pay, or cause to be paid, the aforesaid legacy or sum of (four) hundred pounds, by the said recited will of the said [*testator*], deceased, charged on the said messuages, or tenements, land, and hereditaments, hereinbefore mentioned, and intended to be hereby granted, released, and confirmed, with other hereditaments, when and as the same shall become due and payable, unto the person or persons entitled to receive the same, under and by virtue of the said recited will, and according to the true intent and meaning thereof: AND shall and will thereupon, at his or their costs and expenses, procure good and effectual releases and discharges of and for the same, and accordingly deliver such releases and discharges unto the said [*purchaser*], his heirs or assigns: AND ALSO, that he the said [*vendor*], his heirs, executors, or administrators, shall and will, from time to time, and at all times hereafter, well and truly save, defend, keep harmless and indemnified the

And thereupon to procure and deliver release for legacy to purchaser:

And indemnify purchaser and trustee to prevent dower, and their lands, &c. from legacy, and interest;

(*a*) See a *Bond* from a purchaser to a vendor, for paying Legacies charged on lands, and interest in the meantime, *ante*, Vol. III. p. 275.

BY VENDOR TO PAY A LEGACY, AND INDEMNIFY.

said [*purchaser*], his heirs, executors, administrators, and assigns, and the said [*trustee to prevent dower*], his heirs, and assigns, and their respective lands and tenements, goods, and chattels, and particularly the said messuages or tenements, lands, and hereditaments, first hereinbefore mentioned to be hereby granted and released, from and against the said legacy or sum of (four) hundred pounds, and all interest to grow due in respect thereof; *And also* from and against all and all manner of action and actions, suit and suits, costs, charges, damages, losses, and expenses whatsoever, which shall or may, at any time or times hereafter, be had, brought, commenced, or prosecuted, paid, borne, or sustained against or by the said [*purchaser*], his heirs, executors, administrators, or assigns, or against or by the said [*trustee*], his heirs, executors, administrators, or assigns, for, or by reason, or means, or on account of the said legacy or sum of (four) hundred pounds and interest, or either of them, or for, or by reason, or means, or on account of any act, transaction, matter, cause, or thing whatsoever, in anywise howsoever relating thereto. IN WITNESS, &c.

and from all actions, &c. on account thereof.

COVENANT (*a*) *by a Vendor and his Surety jointly; and each of them separately; and by Two Trustees for Sale, as to their own Acts separately,—with a Purchaser,—that when an Infant, and any after-born Child or Children of the Vendor, shall be competent to release Portions, covenanting Parties or some of them shall, at the Costs of Vendor, &c. procure a Deed or Deeds, releasing the Lands conveyed from the Portions, Maintenance-money, and Interest; and for surrendering the Term created for securing the same: And cause such Deed or Deeds to be delivered to the Vendor; or in case the same shall not be so delivered, then, at the like Costs, procure the Person to whom such Deed or Deeds shall be delivered, to covenant for the Production and Delivery of Copies of the same, to the Purchaser; and procure attested Copies to be made and delivered to the Purchaser: And that the Trustees for Sale shall, when any of the Premises, comprised in the Settlement, shall be sold, invest a competent Part of the Purchase Monies, upon such Securities as are therein mentioned, in the Names of the said Trustees, and a Trustee to be named by the present and future Purchaser, upon such Trusts, for Satisfaction and Discharge of the Portions and Interest, and for the Indemnity of the Purchasers, as shall be deemed necessary.*

THAT WHEN INFANT SHALL BE COMPETENT, PORTIONS SHALL BE RELEASED, AND TERM SURRENDERED.

AND THE SAID [*vendor*] and [*surety*] do hereby jointly covenant for themselves, their heirs, executors, and

Covenant by vendor and surety jointly; and each of them separately;

(*a*) See *Agreement* for the sale of an infant's estate; and covenant, that the infant, or his heirs, when competent, shall convey; *ante*, Vol. I. p. 94;

THAT WHEN INFANTS SHALL BE COMPETENT, PORTIONS SHALL BE RELEASED, AND TERM SURRENDERED.

and by two trustees for sale, as to their own acts separately;

with purchaser, that when infant, and any after-born children of vendor, shall be competent to release portions,

covenanting parties shall procure a deed or deeds, releasing the lands conveyed, from the portions, maintenance-money, and interest;

and for surrendering the term created for securing same:

and cause same to be delivered to purchaser:

administrators; and each of them doth hereby separately, for himself, and for his heirs, executors, and administrators; *And* each of them, the said [*trustees for sale*], as far as regards the acts and deeds of himself, and his heirs only, and not further or otherwise, doth hereby separately, for himself, and for his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns, in manner following, that is to say, that when, and as soon as the said [*infant*], and any child or children of the said [*vendor*], and [*wife*] his wife, hereafter to be born, shall be competent to release his, her, or their share, or respective shares, of the said sum of —— thousand pounds, by the said indenture of settlement hereinbefore recited, directed to be raised for the portions of the younger children of the said [*vendor*] and [*wife*] his said wife, they the said covenanting parties, or some or one of them, their or some or one of their heirs, executors, or administrators, shall and will, at the costs of the said [*vendor*] and [*surety*], or one of them, their or one of their heirs, executors, or administrators, procure a deed or deeds to be executed by him, her, or them respectively, and other necessary parties, for the purpose of releasing and exonerating the hereditaments hereby released, or intended so to be, from the share, or respective shares of the said [*infant*], and such other child or children, if any, as aforesaid, of and in the said sum of —— thousand pounds, and all maintenance-money, and interest in respect thereof; *And also*, for the purpose of surrendering the said term of * one thousand years, raised or created for securing the same: AND shall and will cause such deed or deeds to be delivered up to

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and the *Bond*, in the same transaction, to repay the purchaser the sum paid in part of the purchase-money, with interest, and a further sum, by way of liquidated damages, if the infant, or his heirs, should for six months, after being capable, refuse to make a good title, and execute conveyance; *ante*, Vol. III. p. 315.

Bond for a conveyance by an infant, or his heirs; *ante*, Vol. III. p. 324—339.

Bond that four infants shall convey on severally coming of age; *ante*, Vol. III. p. 344.

the said [*purchaser*], his heirs, appointees, or assigns: OR in case the same shall not be so delivered up as aforesaid, then shall or will, at the like costs and charges as aforesaid, procure the person or persons, to whom such deed or deeds shall be delivered, to enter into the usual covenant for the production and delivering of copies of the same to the said [*purchaser*], his heirs, appointees, and assigns; *And* shall and will cause or procure an attested copy or attested copies of such deed or deeds, to be made at the like costs and expense as aforesaid, and to be delivered to the said [*purchaser*], his heirs, appointees, and assigns: AND FURTHER, that they the said [*trustees for sale*], or the survivor of them, or his heirs, shall or will, when and as soon as any of the hereditaments and premises comprised in the said last in part recited indenture of release shall be sold and disposed of, lay out or invest a competent part of the monies to be produced by the sale thereof, upon such stocks, funds, or securities, as in the same indenture mentioned, in the names of the said [*trustees for sale*], or the survivor of them, his executors, or administrators, and of a trustee or trustees, to be nominated by the said [*purchaser*], his heirs, appointees, or assigns, and such future purchaser or purchasers as aforesaid; *And* upon such trusts, for the satisfaction and discharge of such portions as aforesaid, and the interest thereof, and for the indemnity of the said [*purchaser*], his heirs, appointees, and assigns, and such purchaser or purchasers respectively, as shall be deemed necessary, proper, or expedient. IN WITNESS, &c.

THAT WHEN INFANTS SHALL BE COMPETENT, PORTIONS SHALL BE RELEASED, AND TERM SURRENDERED.

or procure the person to whom such deed or deeds shall be delivered, to covenant for production of same to purchaser;

and that trustees for sale shall, when any of the premises, comprised in settlement, shall be sold, invest a competent part of purchase monies,

upon trusts for satisfaction and discharge of portions, and indemnity of purchasers.

TO REFUND IN CASE OF EVICTION.

COVENANT (*a*) *to refund Consideration Money, with Interest, in case of Eviction within one Year.*

Covenant to refund consideration money, with interest, in case of eviction within one year.

AND THE SAID [*vendors*] do hereby, &c. (*covenant from two to one, jointly and severally*, ut ante, p. 33), that in case there shall at any time within twelve calendar months from the —— day of —— now last past, be any eviction of, or entry upon, or claim at law or in equity of, all or any part of the said messuages, &c., and such eviction, entry, or claim, shall be made or grounded on a good title in any person or persons claiming in opposition or adversely to the said [*vendors*], or the interest derived under them; and the said [*purchaser*], his heirs, appointees, or assigns, shall, upon the request, and at the costs and charges of the said [*vendors*], their heirs, executors, administrators, or assigns, be ready to re-convey all the estate and interest, if any, of him the said [*purchaser*], his heirs, appointees, or assigns, in the said messuages, &c. *Then*, and in that case, they the said [*vendors*], or one of them, their, or one of their heirs, executors, or administrators, if thereunto requested by the said [*purchaser*], his heirs, appointees, or assigns, before the expiration of twelve calendar months, to be computed as aforesaid, shall or will refund and pay to the said [*purchaser*], his heirs, appointees, or assigns, or to the executors or administrators of the said [*purchaser*], *In trust* *for his heirs, appointees, or assigns, the whole of the said [*purchase-money*] pounds, together with lawful interest for the same, from the day of the date of these presents, without any deduction or abatement on any account whatsoever. IN WITNESS, &c.

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(*a*) See *Bond*, on sale of an infant's estate, to refund, pay interest, and liquidated damages, if the infant, or his heirs, should refuse to convey. *Ante*, Vol. 3, p. 314.

Bond for quiet enjoyment, or return of purchase money if evicted. *Ante*, Vol. 3, p. 350.

COVENANT TO STAND SEISED TO USES.

Nature of a covenant to stand seised.

USES may be raised either upon a *valuable* consideration, that is, either money or money's worth, (*ante*, Vol. III. p. 162), or upon what is called a *good* consideration, which is that of blood or marriage. Whatever be the form of the conveyance creating and transferring an use upon the former consideration, it is a *bargain and sale*, and, if for an estate of freehold†, must be enrolled as such; but conveyances, raising uses upon or by virtue of the latter, are termed *covenants to stand seised;* and they are not within the words of the statute of enrolments, nor within the policy of it; because the consideration of blood and marriage is of a public nature. 2 Sand. Uses, 78.

There must be a vested estate in the covenantor.

The covenantor should have a vested estate in possession, reversion, or remainder, in the lands or hereditaments at the time of the execution of the covenant to stand seised. 7 Bac. Abr. Gwill. ed. 101, *Uses*, (E) 2, 4. An existing estate for years not being within the statute of uses, it cannot be *transferred* by a covenant to stand seised; but an estate for years may be *created* out of a freehold estate, by a covenant to stand seised. *Vide ante*, Vol. III. p. 522, ix.

Operative words.

The consideration of this conveyance is the foundation of it. The words *covenant to stand seised* are therefore not absolutely necessary to its operation. A conveyance in the form of, and void as a grant, feoffment, release, bargain and sale, or surrender, may still take *effect as a *covenant to stand seised.* See the several cases stated *ante*, Vol. I. p. 452.

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Consideration.

Uses can only be raised upon a covenant to stand seised in consideration of blood or marriage. 7 Bac. Abr. Gwill. ed. 97, *Uses*, (E) 2. 2. The consideration of blood extends to a parent, child, brother, or other kinsman. The consideration of marriage extends to a marriage had or intended with the covenantor or one of his blood. Com. Dig. *Covenant*, (G. 3).

Therefore, if a man, in consideration of natural love and affection, covenant to stand seised henceforth to the use of his parent, son, brother, nephew, or cousin, this is a good use, and it is immediately executed into

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[† *i. e. Legal* freehold. *Smith* v. *Frederick*, 1 Russ. 174.]

a legal estate by the statute of uses. 2 Jon. 105; Sug. Gilb. Uses, 92; *ante*, Vol. III. p. 507, iv. Or, if a man covenant to stand seised to the use of his wife, son, or cousin, without saying in consideration of the natural love which he bears towards them, the covenant will raise the use. *Bedell's case*, 7 Co. 40. So, if a man, in consideration of natural love to his eldest son, covenant to stand seised to the use of such eldest son in tail, and afterwards to the use of his younger son, brother, or cousin, the consideration extends to the latter. 2 Roll. Abr. 782, pl. 3; Gilb. Uses, 252. If a man, in consideration of affection to a son or brother, covenant to stand seised to the use of such son or brother and his wife, the covenant raises the use for the wife; *Bould* v. *Winston*, 2 Roll. Abr. 784, pl. 3; 783, pl. 1; or if a man, in consideration that B. will marry his daughter, covenant to stand seised to the use of both, it is sufficient to carry the use to them accordingly. *Sharington* v. *Strotten*, 2 Roll. Abr. 784, pl. 2; *Corbin* v. *Corbin*, Ibid. pl. 4; 2 Sand. Uses, 80, 3rd edit.

If a man covenant to stand seised to the use of several, some of whom are not within the consideration, the other shall take the entirety.

Where a man, in consideration of love and affection to his wife and children, and for their maintenance, and to the intent to settle his land in his name and blood, covenanted with his brother and strangers to stand seised to the use of himself for life, then to the use of his wife for life, and then to the use of the covenantees and their heirs, upon trust that they should make such uses as he himself should appoint, and after, to raise portions for his children, and after to his second son in tail;—it was held that no use arose to the strangers, because they could not come within the consideration, yet it did arise to the brother for the whole of the land, to perform the trusts specified in the indenture. 2 Roll. Abr. 783, pl. 4; Gilb. Uses, 113, 254. But if all the covenantees are strangers, the use will not arise, although limited for the benefit of the blood or family of the covenantor, and not for collateral purposes. *Nugent* v. *Hancock*, 22 Vin. Abr. 196, pl. 13; **Jackson* v. *Jackson*, Fitz. 146; Sug. Gilb. Uses, 247. So, if a man should covenant to stand seised to the use of himself for life, with remainder to the use of trustees (who are not his relations), for the purpose of preserving contingent remainders, with remainder to his first and other sons in tail, &c., no use would vest in the trustees; because the consideration does not extend to them; and therefore they cannot enter for, or take the benefit of, a forfeiture committed by the tenant for life. See *Whalley* v. *Tankard*, 2 Lev. 52, 54. This is a principal reason, why covenants to stand seised are fallen into disuse. 2 Sand. Uses, 82, 3rd ed.

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A husband cannot covenant with his wife to stand seised to her use.

If a husband covenant with his wife to stand seised to her use, this is void; for husband and wife, in all matters of property, by the rules of law, are as one person; and no man can covenant with himself. 2 Roll. Abr. 788, (40); Co. Litt. 112. a.; Gilb. Uses, 53. But a husband may covenant with another person that the covenantor will stand seised to the use of his own wife.

A bastard is not a son for whom

If a man covenant, in consideration of blood, and of the marriage of his

bastard daughter, to stand seised to the use of the bastard daughter, it is not a good consideration to raise an use, because in the law she is not his daughter, but *filia populi*. *Frampton* v. *Gerard*, 2 Roll. Abr. 785, pl. 4. So, if a man, in consideration of his care and love which he bears to J. S., called, named, and reputed one of his sons, (where he is no bastard son), covenant to stand seised to the use of the said J. S., this is no good consideration to raise any use, Sir *James Perrot's case*, Ibid. pl. 5, because he is not the son, or of the blood of the father, but a mere stranger in the eye of the law. *Gerrard* v. *Worseley*, Dyer, 374 a, (17); Gilb. Uses, 48, 206; Co. Litt. 123. a.—b. However, if a man levy a fine of lands, and covenant by indenture, in consideration of blood, and of the marriage of the bastard daughter, that the conusee shall stand seised to the use of the daughter; though this is not a good consideration to raise an use by way of covenant, yet it is expressive of the intent of the party, and therefore shall serve as a sufficient declaration of an use upon the fine; because no consideration whatever is essential to declare the use on the seisin of the conusee. 2 Roll. Abr. 791, (10); Gilb. Uses, 46, 113, 114, 207.

the consideration of blood will *raise* an use.

But on an estate otherwise effectually passed, an use may be well *declared* to a bastard being *in esse* and sufficiently described.

Therefore, it appears, that though a bastard is not a *son* for whom the consideration of blood will *raise* an use, yet, on an estate otherwise effectually passed, an use may be as well *declared* to a bastard being *in esse* and sufficiently described, as to another person. The reason why the use to the bastard is bad in the first instance, and good in the second, depends on the common, but perhaps obscure, distinction between *uses raised by transmutation of the possession, as on a feoffment, grant, fine, common recovery, or lease and release, and those raised without, as a covenant to stand seised, or bargain and sale; *ante*, Vol. III. p. 505, 509; or, to express it in more intelligible terms, between declaring uses on a possession or estate actually *transferred* to a *third person*, and declaring them on a possession or estate *retained* in the *party himself*. In the former case, the estate is passed completely from the grantor or donor, without the aid of a court of equity; and therefore it is immaterial, whether the use declared on the estate is gratuitous or not, it being sufficient that the grantee or donee receives it coupled with a trust or use. But in the latter case the transaction rests in covenant or agreement between the covenantor or bargainor and the *cestui que use*; and if the covenant or agreement was not founded on the consideration of *blood* or a *valuable* consideration, such as marriage or money, our courts of equity, which, till the 27th of Hen. VIII. had the sole cognizance of uses, would not interpose to compel the performance. In fewer words, Chancery would enforce uses annexed to a *perfect gift*, however gratuitous they might be, but not those resting only on a *naked contract*, without even so much as the consideration of *blood* to maintain them. The authorities in proof of this distinction are abundant. See Mo. 102; Ow. 40; 1 Leon. 197; 1 Co. 176 b; W. Jo. 346; Cart. 143; 12 Mod. 161; Gilb. on Uses, 113, 207. Add to this the disfavour

The reason why the consideration of blood will not raise an use for a bastard, depends on the distinction between uses raised by transmutation of the possession, and those raised without.

[*39]

of our law to bastardy, in not recognizing any but *legitimate* blood to be a good consideration, and the whole secret of the rule as to uses to bastards will be disclosed. On a covenant to stand seised, an use will not rise to a bastard; because, the use depending on *contract*, some consideration is requisite, and *lawful blood* and *marriage* are the two considerations *peculiar* to such a covenant, which necessarily excludes *bastardy*. But on bargains and sales of land, in which the essential consideration to raising an use is *money* or a *price*, or on any conveyances, on which the estate being passed out of the grantor, and therefore not depending on his contract, uses may be declared without any consideration,—bastards stand precisely on the same footing with other persons, and are equally capable of having uses limited to them. To give the sum of this elucidation in one sentence, where the use will not rise without the consideration of *blood*, if derived through any but the pure channel of marriage, however near the blood may be, it will not avail. Hargr. n. Co. Litt. 123. a. (8).

An use will not arise on a covenant to stand seised to the use of a son-in-law, or the king,

An use will not arise on a covenant to stand seised to the use of a son-in-law, *Coltman* v. *Senhouse*, 2 Show. 12, an uncle-in-law, or a brother-in-law. *Bulkley's case*, Ley, 57, 58. Nor can an use be raised *to the king in consideration that he is the head of the commonwealth. *Wiseman's case*, 2 Co. 15 a, 3.

[*40]

or a friend,

The consideration of ancient acquaintance, or of being chamber-fellows, or entire friends, will not raise any use. *Ward* v. *Tuddingham*, 2 Roll. Abr. 783, pl. 5. So, the consideration of great familiarity, or long acquaintance with the covenantor, or that they were scholars together in their youth, will not raise an use. *Ibid.* pl. 6. The consideration of taking a surname will not raise an use, as was resolved in Sir *Christopher Hatton's case*, who had a sister's son called Newport, and in consideration of his changing his name to Hatton, he covenanted by deed to raise an use to him. This consideration was adjudged not sufficient to raise an use. Jenk. 81, pl. 50.

or in consideration of taking a surname.

Springing and shifting uses are subject to the rule against perpetuities.

Springing and shifting, or secondary, uses, may arise on a covenant to stand seised, but they are subject to the same limits and restrictions as executory devises; *Lloyd* v. *Carew*, Prec. Chan. 72; Show. Par. Cas. 137; Butl. Fearne's Rem. 440, 429; that is, the contingency on which the use is to spring up or shift, must be confined within the compass of a life or lives in being, and twenty-one years after, including a sufficient number of months for the birth of a child *en ventre sa mere*. Harg. n. Co. Litt. 123. b. (2); 2 Hargr. Jurid. Arg. 50, 58; Butl. Fearne, 515; Sug. Gilb. Uses, 260. But a shifting use may be created after an estate tail, to take effect at any period however remote, because such a limitation has no tendency to a perpetuity, inasmuch as the tenant in tail for the time being may, by a recovery, defeat the shifting use. Sug. Gilb. Uses, 157; Butl. Fearne, 423, 428.

A shifting use, after an estate tail, is an exception to the rule.

A springing use may arise on a covenant to stand seised,

Therefore, a person may covenant that he and his heirs will stand seised to an use to arise in future, as from Christmas next, or after the death of the covenantor, or of another person; *Roe* v. *Tranmarr*, Willes, 682; 2 Wils. 75, *ante*, Vol. I. p. 454; *Doe* v. *Whittingham*, 4 Taunt. 20; and in the mean time, until the springing use arises, the estate will remain in the covenantor, or his heir; *Chedington's case*, 1 Co. 154; Com. Dig. Uses, (K. 7.); out of whose seisin the use will arise, unless the seisin be previously destroyed. Therefore, if A. covenant to stand seised to the use of such a wife as he shall hereafter marry, until the marriage, the use results to himself in fee, and it is out of his seisin that the use to the wife must arise: now, if he destroy that seisin before the use comes *in esse*, the use consequently cannot be served. 1 Sand. Uses, 138, 3rd edit.

unless the seisin be previously destroyed.

So, a shifting or secondary use on a covenant to stand seised may be defeated by an alteration of the seisin, before the contingency happens.

So, a shifting or secondary use, on a covenant to stand seised, to take effect in derogation of a previous use in fee, may be defeated by *an alteration of the seisin, on which the use is to arise, before the contingency happens. Therefore, if a man covenant to stand seised to the use of himself in fee, till such a marriage takes effect, and then to the use of himself for life, the remainder to his wife, his son, &c., and before the marriage he makes a feoffment in fee, gift in tail, or lease for life, upon good consideration, without notice of the uses, the uses limited after the marriage shall never arise; because the seisin is changed, and there is no person seised to such uses. Gilb. Uses, 125; Com. Dig. Uses, (D. 2.), (K. 7.), (L. 1.), *Covenant*, (C. 5.). But a lease for years made by the covenantor, before the contingency happens, will not destroy, but only bind the future use during the term. *Reynolds* v. *Wood*, 2 Roll. Abr. 794; *Wood* v. *Reignold*, S. C., Cro. Eliz. 764; Serj. Hill's note, Sug. Gilb. Uses, 289.

[*41]

Under the rule in *Shelley's case* an estate for the covenantor's life by implication will unite with a limitation to the heirs of his body, and create an estate-tail in the covenantor.

Where A., seised in fee, covenanted to stand seised to the use of the heirs male begotten or to be begotten on the body of his second wife, it was (upon the principle laid down by Lord Coke, Co. Lit. 23. a., that so much of the use as the owner does not dispose of, remains in him), held by *Hale*, C. J., and two other judges, that A. took an estate for his own life by implication, the use during his life being undisposed of. And it was held, that, under the rule in *Shelley's case*, the subsequent limitation to the heirs male, &c. was executed on the estate for life which he had by implication, and created an estate-tail in A. *Pybus* v. *Mitford*, 1 Vent. 372; Fearne's Rem. 41, Butl. ed.; Watkins on Descents, 164.

But on a feoffment, &c. an express estate for years limited to the feoffor negatives an estate for his life by implication.

But where uses are raised by a conveyance operating by transmutation of possession, and an express estate for years is limited to the grantor, with a subsequent limitation to the heirs of his body, an estate of freehold shall not be raised by implication, but the limitation to the heirs of the body shall rather be void, if there is no express estate of freehold to support it. *Adams* v. *Savage*, 2 Ld. Raymond, 854; 2 Salk. 679; *Rawley* v. *Holland*, 22 Vin. Abr. 189, pl. 11; 2 Eq. Ca. Abr. 753; Sug. Gilb. Uses, 35, 119, 169.

A covenant to stand seised does not admit of powers generally, though it admits of powers in favour of the covenantor's kindred.

A proviso in a covenant to stand seised, to lease to any man, is void; nor is it any argument in favour of a lease under such a power, that it is granted to some person within the consideration of blood; because, by reason of its generality, the power was void at the time the deed was executed. But a power may be reserved in a covenant to stand seised to grant a lease to a person named in the deed, and within the consideration of blood or marriage, although such a lease cannot be granted where a *general* power is reserved to lease to any man. Sug. Pow. 122, 3rd ed. Sug. Gilb. Uses, 91, (3); 2 Roll. Abr. 260, (A).

[42] If A., for divers good considerations, covenant to stand seised to the use of him that B. shall name, and B. nominate one, no use is raised to him; for there is no particular consideration expressed, and the nominee of B. cannot aver any, because it appears that A. knew not who the nominee would be, and therefore could have no respect for any particular person to make him raise an use. But if A., in consideration of the advancement of his blood, had covenanted with B. to stand seised to the use of such a one of his kindred as B. should appoint, and then B. had nominated one, the nominee would have had a good use; for A. had a design, for very good reasons, to advance some of his family, and he only left it to B.'s judgment who should be the person. Gilb. Uses, 219, 220.

The operation of a covenant to stand seised.

A covenant to stand seised will not create a discontinuance, or a forfeiture, or destroy a contingent remainder, or a power in gross, appendant, or appurtenant. *Ante*, Vol. III. p. 160.

Covenants to stand seised are now wholly disused, and therefore the learning concerning them is only of utility, so far as it can be applied to a conveyance intended to take effect in another form, but which cannot take effect otherwise than as a covenant to stand seised. *Ante*, Vol. I. p. 452.

However, the intention of the parties may be effected, in transactions similar to those in the two following forms, by a covenant to stand seised, at less expense and trouble than by any other mode of conveyance.

COVENANT TO STAND SEISED, *either, to the Use of the Covenantee in Fee, or, to the Use of the Covenantor in Tail Male; Remainder to the Use of the Covenantee in Tail Male; Remainder to the Use of the Heirs of the Covenantor in Fee; with a Power to the Covenantor, to revoke the Uses by his Will, or any other Writing.* IN FEE, OR IN TAIL, WITH POWER OF REVOCATION.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*covenantor*], of &c., of the one part; and [*covenantee*], of &c., the father of the said [*covenantor*], of the other part: WITNESSETH, that the said [*covenantor*], in consideration of the natural love and affection which the said [*covenantor*] hath and beareth for the said [*covenantee*], his said father, doth, for himself and his heirs, covenant and grant with and to the said [*covenantee*], and his heirs, that he the said [*covenantor*], and his heirs, shall and will henceforth stand and be seised of and in ALL THAT the manor and lordship of ——, in the county of ——, and all other lands and hereditaments whatsoever of him the said [*covenantor*], in ——, aforesaid, and all other his manors, lands, and hereditaments whatsoever, whereof he the said [*covenantor*] now is or standeth seised of and in an estate of fee-simple, with their and every of their rights, members, and appurtenances, TO THE USE AND BEHOOF (*a*) of him the said [*covenantor*], and the heirs male of his body, lawfully *begotten: AND, for default of such issue, TO THE USE AND BEHOOF of the said [*covenantee*], and the heirs male of his

Parties.

Covenant to stand seised of

Parcels,

To the use of the covenantor in tail male:

remainder To the use of the covenantee in tail male:

(*a*) If the covenant to stand seised is to be in fee absolutely, say—

" TO THE USE AND BEHOOF of the said [*covenantee*], his heirs, and assigns, for ever. IN WITNESS, &c. IN FEE.

IN FEE, OR IN TAIL, WITH POWER OF REVOCATION.

body, lawfully begotten: And, for default of such issue, To the use and behoof of the right heirs of him the said [*covenantor*], for ever: Provided always, *and it is hereby covenanted and agreed*, by and between the said parties to these presents, That it shall and may be lawful to and for the said [*covenantor*], at any time or times, during his natural life, by his last will in writing, by him signed and published in the presence of two or more credible witnesses, or by any other writing or writings by him signed and sealed in the presence of two or more credible witnesses, to revoke or alter all or any of the said use or uses of all or any part of the said manor, lands, and hereditaments, any thing in these presents contained to the contrary notwithstanding. In witness, &c.

remainder to the use of the heirs of the covenantor in fee.

Power to the covenantor to revoke the uses by his will, or any other writing.

IN FEE, WITH PROVISO FOR CESSER.

COVENANT to stand seised *to the Use of the Covenantee in Fee; with a Proviso, that, in case the Covenantor, or his Heirs, shall convey other Lands to the Covenantee and his Heirs, the Use hereby limited shall cease.*

This indenture, made the —— day of ——, in the year of our Lord 18—, Between [*covenantor*], of &c., of the one part; and [*covenantee*], of &c., one of the sons (*or* nephews, &c.), of the said [*covenantor*], of the other part: Witnesseth, that, for and in consideration of the natural love and affection which the said [*covenantor*] hath and beareth for the said [*covenantee*], He the said [*covenantor*] doth for himself, and his heirs, covenant and grant with and to the said [*covenantee*], and his heirs, That he the said [*covenantor*], and his heirs, shall and will, from time to time, and at all times hereafter, stand and be seised of *and in All those the manors, &c., with the appurtenances, To the sole use and behoof of him the said [*covenantee*], his heirs, and assigns, for ever; and to and for no other use, intent, or purpose whatsoever. Provided always, and it is the true intent and meaning of

Parties.

Covenant to stand seised to the use of the covenantee in fee.

[*45]

Proviso that in case the cove-

these presents, and of the parties hereto, That if the said [*covenantor*], or his heirs, shall at any time hereafter, by good and sufficient conveyances and assurances in the law, convey and assure to the said [*covenantee*], and his heirs, the present inheritance in fee-simple of and in *All that*, &c. And that, free and clear from all incumbrances, except tenants' leases, whereon the customary rents shall be reserved, then from and immediately after the executing of such conveyances and assurances to the said [*covenantee*], and his heirs, as aforesaid, The use and estate hereinbefore limited to the said [*covenantee*], and his heirs, of and in the said manors, &c., shall thenceforth cease and determine: And that, in such case, it shall and may be lawful to and for the said [*covenantor*], and his heirs, to enter into the said last-mentioned manors, &c., (the use whereof is hereby intended to cease as aforesaid), as in his and their former estate. In witness, &c.

IN FEE, WITH PROVISO FOR CESSER.

nantor, or his heirs, shall convey other lands to the covenantee and his heirs, the use hereby limited sh all cease.

[46]

DEFEAZANCE.

A DEFEAZANCE is an instrument which defeats the force or operation of some other deed or estate; and that which in the *same deed* is called a condition, if it be in a *separate* deed, is called a defeazance. Com. Dig. *Defeazance*, (A). The word is derived from the French word *defaire*, to defeat or undo, *infectum reddere quod factum est*. Co. Litt. 236. b.

Definition of a defeazance.

Defeazances are of two sorts, one applicable to freehold estates, the other to terms for years and other executory interests. In regard to freehold estates, a defeazance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. The defeazance must therefore be made at the same time that the feoffment or other conveyance is made, and must form part of the same transaction. Co. Litt. 236. b.; Pres. Watk. Conv. 230.

As to freehold estates, a defeazance must be made at the same time as the feoffment or other conveyance.

A defeazance of a freehold estate is now seldom resorted to, a condition in the conveyance being preferable.

A defeazance of a freehold estate is now, however, seldom resorted to, as it is preferable to make the conditions apparent in the deed, so that the deed may be complete in itself. For, as the conveyance is absolute, should the defeazance, which is contained in a separate instrument, be lost, the proof of the condition might be difficult, and often impossible. In the case of *Cottrel* v. *Purchase*, Sel. Chan. Cases, 61; 15 Vin. Abr. 439, Lord Talbot said, he should always discourage the practice of drawing an absolute deed, and making a defeazance, as it wore the face of fraud.

A future power may be defeazanced at any time.

Where a power is future, and to arise by a contingent event, it may be defeazanced, and thereby utterly annulled. *Albany's case*, 1 Co. 110 b. So it may be defeated in part. Thus, where a man had a general executory power of revocation, and he covenanted not to *exercise the power without the consent of the Lord Keeper, and granted that all revocations without such consent should be void; it was determined that the power, being executory, might well be defeated by a separate deed. *Leigh* v. *Winter*, 1 Jo. 411; and see Earl of *Tankerville* v. *Coke*, Mose. 146. But it seems to have been doubted whether a power can be released in part. *Digges's case*, Mo. 605; but see Countess of *Roscommon* v. *Fowke*, 4 Bro. Par. Cas. 523; Sug. Pow. 66, 3rd ed.

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Rents, annuities, conditions, warranties, statutes, recognizances, bonds, and other things executory, may be defeazanced at any time.

Executory interests, as rents, annuities, conditions, warranties, and such like, that are inheritances executory, may be defeated by defeazances made, either at the time, or at any time after: and so the law is of statutes, recognizances, bonds, or obligations, and other things executory. Co. Litt. 237. a. (As to terms for years, *vide post*, p. 55).

For instance, if a bond be given absolutely, it may be afterwards rendered conditional by a defeazance; or, if given on a condition, the condition may be altered or varied by a defeazance.

As where a man by deed grants that, upon payment of a less sum on a particular day, an obligation, recognizance, statute, &c., shall be void. *Hodges* v. *Smith*, Cro. Eliz. 623.

Every defeazance must contain proper words, as that the *thing shall be void*. *Lacy* v. *Kynaston*, 2 Salk. 575; *Trevett* v. *Aggas*, Willes's Rep. 108. But a letter of license that the *obligor shall not be sued*, amounts to a defeazance. *Ayloffe* v. *Scrimpshire*, Carth. 64. And the defeazance must be by matter as high as the instrument to be defeated; therefore, where in debt on bond conditioned for payment of 20*l.* on a certain day, the defendant pleaded, that, before the day, the plaintiff, on account of a trespass committed by his cattle on the defendant's lands, gave him a further day of payment, the plea was held bad on demurrer, because an agreement by *parol* cannot dispense with a deed. *Hayford* v. *Andrews*, Cro. Eliz. 697; Moor, 573, *S. C.*; *Thompson* v. *Brown*, 1 B. Moore, 358; *Davey* v. *Prendergrass*, 5 Barn. & Ald. 187; *Bulteel* v. *Jarrold*, 8 Price, 467. So where, to debt on bond conditioned for pay-

The defeazance must be by matter as high as the instrument to be defeated.

ment of money on a certain day, the defendant pleaded that the plaintiff *per scriptum suum sub manu suâ signat'* agreed to give time to a future day, the plea was held insufficient on a general demurrer, for the words *scriptum sub manu suâ signat'* do not imply a deed. *Blemerhasset* v. *Pierson*, 3 Lev. 234. So where, in covenant for non-payment of money, the defendant pleaded a discharge in nature of a release *without deed*, the plea on demurrer was adjudged to be ill. *Rogers* v. *Payne*, 2 Wills. 376. Also, where a lease contained a proviso that the lessee should not let without leave in *writing*, on pain of *forfeiture, a *parol* license was held not to discharge the lessee from the proviso. *Roe* v. *Harrison*, 2 Durnf. & East, 425; *Mease* v. *Mease*, Cowp. 47; *Littler* v. *Holland*, 3 Durnf. & East, 590, 592; and *Brown* v. *Goodman*, there cited, note (b); Wms. n. 2 Saund. 47, s. (1).

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The defeazance must recite, truly, the deed it is meant to defeat.

Where the defeazance recites the deed which it is meant to defeat, as it always does, it must recite it truly; for if a defeazance be made of a statute or an obligation, which is recited to be made the 10th day of May, whereas in truth it beareth date the 1st day of May, this defeazance is void, inasmuch as it refers to that which does not exist; and the date is so material a part of the description, that it cannot be corrected by averment. Hence the utility of taking away the materiality of the date, by reciting deeds as bearing date *on or about*, &c. This mode lets in an averment of the true date. *Vide ante*, Vol. II. p. 45, (*a*).

By reciting a deed as bearing date *on or about*, lets in an averment of the true date.

A defeazance must be made between the same persons that were parties to the first deed, &c., or so many of them as are concerned in interest, or their representatives; for it is sufficient that they represent the person, and are privy in point of interest, as heirs, executors, and administrators, whether they are by the defeazance to grant or accept the discharge. Pres. Shep. Touch. 397.

A defeazance must be made between the same persons as were interested parties to the first deed, &c., or their representatives.

A condition or defeazance must be strictly performed.

A condition or defeazance, being in favour of the obligor, conusor, &c., must be strictly performed; therefore, if there be a condition or defeazance to make the obligation, recognizance, &c., void, on payment of a certain sum, *on* a particular day, the obligor or conusor must pay or tender the money *on* or before the day; but the plea of payment must in form state it to have been made *on* the day. *Bond* v. *Richardson*, Cro. Eliz. 142; *Holmes* v. *Brockett*, Cro. Jac. 434; *Sturdy* v. *Arnaud*, 3 Durnf. & East, 601; *Dyke* v. *Sweeting*, Willes, 586. The reason is, that if the plea state a payment *before* the day, and issue be taken thereon and found for the plaintiff, yet he cannot have judgment; for the issue is immaterial, since, notwithstanding this verdict, payment might have been made *on* the day; but if the issue had been found for the defendant, it would probably be cured by the verdict. Whether the condition of the bond be for payment *on* a particular day, or *on or before* that day, if the

On the plea of payment.

plea state a payment *on* the day, the replication may simply deny it; for evidence of payment *before* the day will support the issue on the part of the defendant; *Sturdy* v. *Arnaud*, 3 Durnf. & East, 601, *per* Buller, J.; and therefore, if the issue be found for the plaintiff, the verdict in fact ne-
[*19] gatives a payment *on or *before* the day. But where it is to be void on payment of the money on *or before* such a day, the plea may state payment *before* the day, and the plaintiff may reply that it was not paid at the particular day mentioned in the plea, *nor at any time before or after that day*, (or perhaps more correctly), "nor at any time on or before the said —— day of ——," (the day mentioned in the condition of the bond), which will bring the point to the proper issue, whether the money has ever been paid at all or not: but he must by no means demur; the distinction being, that where the money is payable by the condition at a particular day, the defendant must plead payment at the day, but where it is *at* or *before* the day, it is otherwise. *Fletcher* v. *Kennington*, Willes's Rep. 587, n. (*a*). And it will be a good bar without an acquittance under seal. Co. Litt. 212. b.; Earl of *Huntingdon* v. *Hall*, Cro. Eliz. 823; *Mærle* v. *Make*, 2 Salk. 508. And in pleading a tender according to a defeazance in *another deed*, it is not necessary either to plead that the defendant *has always been and still is ready to pay*, or bring the money into court; but it is sufficient to plead that *on the day he tendered;* but if the defeazance be in the *same* deed, it is otherwise. *Trevett* v. *Aggas*, Willes's Rep. 107. Formerly, payment *after* the day could not be pleaded without an acquittance by deed. *Nichol's case*, 5 Co. 43; *S. C.* Cro. Eliz. 455; Moor, 692; Gilb. H. C. P. 140, 3rd edit. However, by statute 4 Ann. c. 16, s. 12, it is enacted, that "in debt on a single bill, or debt or *scire facias* on "a judgment, if the defendant has paid the money, the payment may be "pleaded in bar of the action or suit; and in debt upon bond, which has "a condition or defeazance to make void the same upon payment of a less "sum at a certain day or place, if the obligor, his heirs, executors, or ad-"ministrators have, before the action brought, paid to the obligee, his ex-"ecutors or administrators, the principal and interest due by the defea-"zance or condition, though such payment was not made strictly accord-"ing to the condition or defeazance, yet it may nevertheless be pleaded "in bar of the action, and shall be as effectual a bar thereof as if the mo-"ney had been paid *at* the day and place according to the condition or "defeazance, and had been so pleaded;" so that now it is become a common plea, that the defendant paid the money after the day, and before the action, according to the statute. But he cannot plead that he *tendered* the money after the day. *Dixon* v. *Parkes*, 1 Esp. 110; *Player* v. *Bandy*, 10 Mod. 26; 2 Wms. Saund. 47 t. See, as to a defeazance to a warrant of attorney to confess judgment, *ante*, Vol. II. pp. 288, 349, 639.

Payment after the day before the action brought, may be pleaded in bar.

DEFEAZANCE *to a* JUDGMENT *entered up under a* Cognovit Actionem, *declaring that the Judgment is intended as a Security for the Payment of the Principal and Interest by three Instalments; and as a Security for the Costs as between Attorney and Client; that the total Sum to be secured by the Judgment shall not exceed a given Sum; that no Execution, &c., shall issue, until Default in Payment of some Instalment, or of the Costs; that in Case of any Default, Execution may be sued out for the whole Amount then due; and that it shall not be necessary to revive the Judgment.*

TO A JUDGMENT UNDER A COGNOVIT.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*four assignees*], of &c., (assignees of the estate and effects of [*three bankrupts*], late of —— aforesaid, bankers and co-partners, bankrupts), of the one part; and [*debtor*], of ——, in the said county of ——, esquire, of the other part: WHEREAS an action was commenced in his Majesty's Court of King's Bench, at Westminster, in —— Term, in the year 18—, by the said [*assignees*], (assignees of the estate and effects of the said [*three bankrupts*], bankrupts), as plaintiffs, and the said [*debtor*], defendant, on two certain bills of exchange. AND WHEREAS, by a *cognovit*, bearing date on or about the —— day of ——, 18—, the said [*debtor*] confessed the said action; *And* that the plaintiffs had sustained damages, to the amount of five thousand pounds, besides their costs and charges, to be taxed by the Master: *And* the said [*debtor*], the said defendant, thereby also declared, that in case he should make default in payment of the sum of two thousand three hundred and fifty-one pounds, five shillings, being the balance of the debt in the said action, (after allowing to the said [*debtor*], the defendant, the set-off of which he had given notice in

Parties.

Recital of an action in King's Bench:

of a *cognovit*:

TO A JUDGMENT UNDER A COGNOVIT.

the said action), together with the said costs, on the —— day of —— then next, the said [*assignees*], the said plaintiffs, should be at liberty to enter up judgment, as of —— Term then next, for the said sum of five thousand pounds; and to sue out execution thereon for the said sum of two thousand three hundred and fifty-one pounds five shillings, and also for the costs of entering up such judgment, and of suing out execution thereon, officers' fees, sheriff's poundage, costs of levying, and all other incidental expenses: *And* the said [*debtor*], the defendant, did thereby also undertake not to bring any writ of error, nor file any bill in Equity, nor to do any matter or thing whatsoever, to delay the said plaintiffs in the said action from entering up their judgment, or suing out execution thereon, as aforesaid. AND WHEREAS the said [*debtor*] made default in payment of the said sum of two thousand three hundred and fifty-one pounds, five shillings, on the —— day of —— instant; and the same sum and interest, and costs, still remain due and unpaid; and judgment has accordingly been entered up against him by the said [*assignees*], plaintiffs, as of —— Term last. AND WHEREAS the said [*debtor*] has requested the said [*assignees*] to give him time for payment of the said sum of two thousand three hundred and fifty-one pounds, five shillings, so due and unpaid as aforesaid, which they have agreed to do, in consideration of the said [*debtor*] agreeing to pay the said sum of two thousand three hundred and fifty-one pounds, five shillings, by the instalments and in the manner hereinafter mentioned, with interest on the same sum, computed from the [*day originally appointed for payment*] day of —— now instant; and also to pay all the costs, charges, and expenses of, and incurred in, about, and relating to the above-mentioned action, as between attorney and client; and the costs of entering up the said judgment; and also the expenses of preparing and executing these presents, and of the bond of even date herewith, and hereinafter recited, without any deduction whatsoever: *And also* in consideration of the said [*debtor*] procuring [*three sureties*], of &c., to enter into such bond as is next hereinafter recited. AND WHEREAS, in pursuance of the said agreement, the said [*three sureties*], by their bond or obligation in writing, of

of default in payment pursuant to the *cognovit*; and that judgment has been entered up:

that debtor has requested, and creditors agreed to give time for payment by instalments of principal, interest, and costs:

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of a bond from three sureties for payment by in-

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even date herewith, are jointly and severally bound to the said [*assignees*] in the penal sum of five thousand pounds; with a condition thereunder written, for making void the said bond, on payment by the said [*debtor*], or the said [*sureties*], or any of them, their, or any of their heirs, executors, or administrators, unto the said [*assignees*], their executors, administrators, or assigns, or any of them, of the sum of two thousand three hundred and fifty-one pounds, five shillings, by the instalments therein mentioned, and the costs, charges, and expenses of, and incurred in, about, and relating to the said action, as between attorney and client, and the costs of entering up the said judgment, and also the expense of preparing and executing these presents and the said bond, as therein also is expressed. NOW THIS INDENTURE WITNESSETH, that the said judgment, so entered up against the said [*debtor*] by the said [*assignees*], is intended as a security for the payment by the said [*debtor*], his heirs, executors, or administrators, unto the said [*assignees*], their executors, administrators, or assigns, of the principal sum of two thousand three hundred and fifty-one pounds, five shillings, of lawful money of Great Britain, with interest thereon, after the rate of five pounds for every one hundred pounds, by the year, to be computed from the said —— day of —— now instant, by the instalments, on the days, and in the manner following; (that is to say), the sum of seven hundred and eighty-three pounds, fifteen shillings, being one-third part of the said sum of two thousand three hundred and fifty-one pounds, five shillings, on the —— day of —— next ensuing the date of these presents, with the sum of thirteen pounds, three shillings, and one penny, being the amount of the interest, which (after the rate aforesaid) will then have accrued due on the said sum of two thousand three hundred and fifty-one pounds, five shillings, computed from the said —— day of —— now instant; and the further sum of seven hundred and eighty-three pounds, fifteen shillings, being another third part of the said principal sum of two thousand three hundred and fifty-one pounds, five shillings, on the *—— day of —— next ensuing the date of these presents, [*53] together with the sum of six pounds and two pence, being the amount of the interest, which (after the rate

stalments of principal and costs:

Testatum, that the judgment is intended as a security for the payment of the principal and interest, by three instalments.

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aforesaid) will then have accrued due on the sum of one thousand five hundred and sixty-seven pounds, ten shillings, computed from the said —— day of ——; and the sum of seven hundred and eighty-three pounds, fifteen shillings, being the remaining third part of the said principal sum of two thousand three hundred and fifty-one pounds, five shillings, on the —— day of —— next ensuing the date of these presents, together with the sum of three pounds, six shillings, and sixpence, being the amount of interest, which (after the rate aforesaid) will then have accrued due on the said sum of seven hundred and eighty-three pounds, fifteen shillings, from the said —— day of ——, to the said —— day of ——. AND THIS INDENTURE ALSO WITNESSETH, that the said judgment, so entered up as aforesaid, was so entered up also as a security for the payment by the said [*debtor*], his heirs, executors, or administrators, unto the said [*assignees*], their executors, administrators, or assigns, of all the costs, charges, and expenses, as between attorney and client, without any deduction whatsoever, already sustained, laid out, expended, or incurred, or which shall hereafter be sustained, laid out, expended, or incurred for or on their behalf, in, about, or relating to the said action, so commenced by them against the said [*debtor*], as aforesaid, and of all costs, without deduction as aforesaid, of entering up the said judgment, and also the expenses of preparing and executing these presents, and the said bond, of even date herewith. AND *it is hereby agreed*, that the total amount of the principal money, interest, costs, and expenses intended to be secured by the said judgment, so entered up as aforesaid, which shall be ultimately recoverable on such judgment, shall not exceed the sum of two thousand eight hundred pounds, of lawful money of Great Britain. AND *it is hereby agreed*, by the said parties, that no action, execution, or other process, or proceeding whatsoever, shall be commenced, sued out, or prosecuted against the said [*debtor*], his heirs, executors, or administrators, or his or their lands, goods, and chattels, upon the judgment so *entered up as aforesaid, until default shall happen to be made of, or in payment of, any such instalment, or any part of any instalment of the said principal sum of two thousand three hun-

Further *testatum*,

That the judgment was entered up as a security for the costs, as between attorney and client:

that the total sum to be secured by the judgment shall not exceed £——:

that no execution, &c. shall issue, until default in payment of some instalment;

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dred and fifty-one pounds, five shillings, or of any part of the interest thereon, or until default shall be made in payment of the costs and expenses, as aforesaid, at or on any of the days or times hereinbefore mentioned for payment thereof respectively. But *it is hereby expressly agreed*, that in case of any default being made of or in payment of any instalment of the said principal sum, and interest, or of the costs and expenses, as aforesaid, at the respective times aforesaid, or of any part thereof respectively, it shall be lawful for the said [*assignees*], and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, to cause execution to be issued forthwith on the said judgment, or so soon after any such default, as they or he, in their or his discretion, shall think proper, for the whole of the said sum of two thousand three hundred and fifty-one pounds, five shillings, and the whole of the said interest thereon, as shall then have accrued due, and the said costs and expenses, or for so much of such principal, interest, costs, and expenses as shall then remain unpaid, at the times above mentioned for payment of some of the said instalments of the said principal sum, and the time above appointed for payment of the said costs and expenses, although the time appointed for the last of such payments shall not have arrived; and that without giving any previous notice whatsoever to the said [*debtor*], his heirs, executors, administrators, or assigns, or any of them. And *it is hereby lastly declared*, that it shall not be necessary for the said [*assignees*], or any of them, their, or any of their executors, administrators, or assigns, to revive, or cause the said judgment, so entered up as aforesaid, to be revived; or to do any act, deed, matter, or thing whatsoever, to keep the same on foot, notwithstanding the said judgment shall have been entered on record for the space of one year and upwards; and notwithstanding any rule or practice in the court in which the said judgment is entered on record; and that he the said [*debtor*], his heirs, executors, administrators, or assigns, shall not nor will take *or receive, or attempt, by any ways or means, to have, take, or receive any advantage, for want of the reviving or keeping the said judgment on foot. In witness, &c.

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or of the costs:

that in case of any default, execution may be sued out for the whole amount then due:

that it shall not be necessary to revive the judgment.

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DEFEAZANCE REVIVING THE CONDITION OF A LEASE.

A condition dispensed with in part, is determined in the whole; therefore, if a lease be granted, subject to a condition not to alien without license, on alienation with license, all subsequent alienations are dispensed with.

A CONDITION dispensed with in part, is determined in the whole. Thus, in *Dumpor's case*, 4 Co. 119, the president and scholars of Corpus Christi in Oxford made a lease for years of land to Bolde; proviso that the lessee, or his assigns, should not alien the premises to any person or persons, without the special license of the lessors. And afterwards the lessors, by their deed, licensed the lessee to alien or demise the land, or any part of it, to any person or persons whomsoever. And afterwards, the lessee assigned the term to Tubbe, who, by his last will bequeathed it to his son, and by the same will made his son executor, and died. The son entered generally, and the testator was not indebted to any person, and afterwards the son died intestate, and the ordinary committed administration to one who assigned the term to the defendant. The president and scholars entered for the condition broken, and, upon a special verdict, judgment was given against the plaintiff. And it was resolved, That the alienation by license to Tubbe had determined the condition, so that no alienation, which he might afterwards make, could break the proviso, or give cause of entry to the lessors; for the lessors could not dispense with an alienation for one time, and that the same estate should remain subject to the proviso after. And although the proviso be, that the lessee or his assigns shall not alien, yet when the lessors license the lessee to [*56] alien, they shall never defeat, by force of the said proviso, the term *which is absolutely aliened by their license; inasmuch as the assignee has the same term which was assigned by their assent: so if the lessors dispense with one alienation, they thereby dispense with all alienations after; for inasmuch as by force of the lessor's license, and of the lessee's assignment, the estate and interest of Tubbe was absolute, it is not possible that his assignee, who has his estate and interest, shall be subject to the first condition: and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons; for if the lessors dispense with one, all the others are at liberty. *Dumpor's case*, 4 Co. 119; *Dumpor* v. *Syms*, Cro. Eliz. 815, *S. C.*

So it is as to part of the lands leased; for if a man lease land upon condition that the lessee shall not alien the land or any part of it, without the assent of the lessor, and afterwards he aliens part with the assent of the lessor, he may afterwards alien the residue without his assent; for the condition cannot be divided or apportioned by the act of the parties: and as to the part which was aliened by the assent of the lessor, the condition is determined; for although the lessee aliens any part of the residue, the lessor shall not enter into the part aliened by license; and, therefore, the condition being determined in part, is determined in all. *Per Popham*, Chief Justice, 4 Co. 120; 1 Roll. Abr. 471 (G.), pl. 2; 5 Vin. Abr. 298; 2 Cru. Dig. 9, 2nd ed.

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On a lease, on condition not to alien the land or any part of it, without assent, alienation of part, with assent, determines the condition as to the whole.

So, where a proviso in an indenture of lease was, that the lessee, his executors, or assigns, should not alien to any person without license of the lessor, but only to one of the sons of the lessee: the lessee died, his executor assigned it over to one of his sons: it was held by two of the judges against three, that the son might alien to whom he pleased, without license; for the condition, as to the son, was determined. Dyer, 152, pl. 7. The authority of the opinion of the two judges appears to be recognised; 4 Co. 120 b; and by Lord *Eldon*, 14 Ves. 176. But see *contra*, *Thornhill* v. *King*, Cro. Eliz. 757; and *Lloyd* v. *Crispe*, 5 Taunt. 252.

Condition that lessee, his executors or assigns, should not alien without license, but only to one of lessee's sons; on assignment to son, condition is gone.

And, therefore, it was adjudged in *Leeds* v. *Crompton*, 1 Roll. Abr. 472, *Condition*, (G.), pl. 7; 5 Vin. Abr. 299; Noy's Rep. 32; 2 Buls. 291; S. C. *Lylds* v. *Crompton*, Cro. Eliz. 816; *Lees* v. Lord *Stafford*, 4 Leon. 58, that where the Lord Stafford made a lease to three, upon condition that they or any of them should not alien without the assent of the lessor, and afterwards one aliened by his assent, and afterwards the other two without license, and it was adjudged, that in this case the condition being determined as to one person (by the license of the lessor) was determined in all.

On a lease to three, on condition not to alien, without assent, alienation by one with assent determines the condition as to all.

In *Lloyd* v. *Crispe*, 5 Taunt. 252, there was a proviso for re-entry on *breach of covenant, and there was a covenant that the lessee, his executors, administrators, or assigns, should not, at any time during the term, assign over or otherwise part with that indenture, or the demised premises, to any person or persons whomsoever, *except by his or their last will and testament*, without the license of the lessor, his heirs or assigns, in writing, under his or their hand and seal for that purpose first had. The lessee by his will bequeathed the lease to his widow, and appointed her and others his executors; and all the executors assigned the lease to the defendant, without assenting to the devise to the widow. It was distinctly proved that the lessor had received rent from the defendant after the assignment; but it was not distinctly proved that he had previously become acquainted with the fact of alienation. The defendant was a servant in the house during the life of the lessee, and used to go to the lessor, and pay the rent for his master. The majority of the Court

Executors, or legatee, cannot assign without license.

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held (against the opinion of Chief Justice *Mansfield*), that the vendor having contracted to assign his interest in the lease, it was incumbent on him, and not on the purchaser, to procure the lessor's license for the assignment. The majority of the Court therefore held, that admitting the receipt of rent from the defendant, after notice of the assignment, was a waiver of the right of re-entry for a breach of the condition, by the assignment of the lessee's executors, yet that a license was necessary to enable the defendant to assign. *Chambre* and *Gibbs* seem to have been of opinion, that, where the proviso contains an exception of assignments by will, the executors or legatee cannot therefore assign without license: but the Chief Justice seems to have been of opinion, that the lessor, by accepting rent of the assignee, although he had never assented to the assignment in writing, according to the terms of the proviso, had waived the covenant, and that the assignee might assign to another without license. However, where the condition of re-entry was, "if the lessee shall underlet, assign, or transfer the premises, or any part thereof, without the consent of the lessor in writing under his hand and seal," acceptance by the lessor of rent due after a breach of the condition, with notice of it, was held to be a *waiver* of the forfeiture. *Goodright* v. *Davids*, Cowp. 803. But in such case there can be no *express* license given by the lessor to underlet, &c. except *by writing under his hand and seal*; a *parol* license will not do; though acceptance of subsequent rent, with notice, is sufficient *to waive* the forfeiture. *Roe* v. *Harrison*, 2 Durnf. & East, 425, 430. And it has been held, that a lessor who has a right of re-entry on breach of a covenant to underlet, does not, by waiving his re-entry on one underletting, lose his right to re-enter *on a subsequent underletting. Nor, by waiving his right to re-enter on a breach of covenant to repair, does he waive his re-entry on a subsequent want of repairs. *Doe* v. *Bliss*, 4 Taunt. 735, and see 1 Ves. & Bea. 191. So, where a lease of coal mines reserved a royalty rent for every ton of coals raised, and contained a proviso that the lease should be void, to all intents and purposes, if the tenant should cease working at any time two years. After the working had ceased more than two years, the lessor received rent: and it was held, that a tenancy from year to year was not thereby created; for the lease was not absolutely void by the cesser to work, but voidable only at the option of the lessor, and that he might avoid the lease upon any cesser to work, commencing two years before the day of demise in the ejectment. *Doe* v. *Bancks*, 4 Barnw. & Ald. 401; and see *Read* v. *Farr*, Wms. Saund. ed. Patt. & Wms. 287 *d*.

A waiver of a right of re-entry for condition broken, does not destroy the right to re-enter for a subsequent breach.

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Held in equity, that a condition for re-entry upon assignment by lessee, his executors, administrators or

The doctrine of *Dumpor's case*, that a dispensation with any part of a condition, is a determination of the condition entirely, is followed in equity. Thus, where a lease was granted, subject to a proviso for re-entry, in case of breach of the covenants, or if the lessee, his executors, administrators or assigns should assign without the license and consent

of the lessor, his heirs, or assigns: the premises were afterwards assigned by the lessee, with the consent of the lessor, to the assignee, his executors, administrators, and assigns. Lord *Eldon* said, though *Dumpor's case* always struck me as extraordinary, it is the law of the land at this day. My opinion, therefore, without considering the particular terms of the assignment, is, that this assignee has the power of assigning without license. *Brummell* v. *Macpherson*, 14 Ves. 175; and see *Macher* v. *The Foundling Hospital*, 1 Ves. & Bea. 191.

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assigns, without license, ceases by assignment with license, though to a particular individual.

Therefore, it seems to follow, that if the condition of a lease consist of several branches, giving to the lessor or his heirs a power of re-entry, or declaring the lease shall be void on non-payment of rent, assigning or underletting without license, or non-performance of the covenants, &c.;— an express dispensation with any part of the condition will be a dispensation with the condition entirely. So, it seems, where the condition embraces non-performance of the covenants, &c. (as in *Crusoe* v. *Bugby*, 3 Wils. 234; *Macher* v. *The Foundling Hospital*, 1 Ves. & Bea. 191; *Lloyd* v. *Crispe*, 5 Taunt. 252; and see *Jones* v. *Jones*, 12 Ves. 187, 191; *ante*, Vol. I. pp. 27, 29), and a part of the covenants is released, the condition is dispensed with entirely. *Vide ante*, Vol. I. p. 283.

If the condition of a lease consist of several branches, a dispensation with any part of the condition will be a dispensation with the whole.

A lease for years may be defeazanced by a condition, as made at the time of granting the lease, or at any time afterwards. Therefore, *when the condition is expressly dispensed with, either wholly, or in part, the condition should be revived by defeazance, either wholly, as in the above form, or, as to those parts which are not dispensed with, as in the form, *ante*, Vol. I. p. 282. So, where part of the lands is released from the condition, the condition should be revived as to those parts which are not released. *Vide ante*, Vol. I. p. 168.

When a condition is dispensed with, it should be revived by defeazance.

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A defeazance seems to be the only effectual way of reviving the condition, after it is dispensed with. However, some gentlemen add a restriction to the license to assign, that it shall not authorize further assignments, and that the assignee shall hold the premises, subject to the rent, covenants, and conditions contained in the lease. But that method cannot be depended on; for, in *Mason* v. *Corder*, 7 Taunt. 11, Mr. Serjeant *Best*, (afterwards Chief Justice *Best*), intimated, that if the lessor had given his consent to the assignment in conditional or restrictive terms, he might, notwithstanding the doctrine of *Dumpor's case*, have restrained the defendant from subsequently assigning without consent; and he said, the practice of lessors was such. But Chief Justice *Gibbs* intimated, that there would be great difficulty in effectuating such a restriction, because the doctrine in *Dumpor's case* is, that the condition is indivisible.

A restriction in a license to assign, that it shall not authorize further assignments, seems to be insufficient for that purpose.

However, on an agreement for assigning a lease, in which there is a condition restraining assignment without the landlord's consent, the vendor is bound to procure such consent: *Lloyd* v. *Crispe*, 5 Taunt. 249: and the purchaser is not bound, in the absence of any stipulation, to execute

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a defeazance reviving the condition, or to take a new lease, with such a condition. *Mason* v. *Corder*, 7 Taunt. 12; *ante*, Vol. I. p. 165-6.

See the form of an *Agreement* for the purchase of a leasehold estate, and to execute a defeazance reviving the condition of the lease, *ante*, Vol. I. p. 168.

A scheme has been suggested, to avoid the operation of the restriction against assigning without license; *ante*, Vol. I. p. 22-3; but see *Lloyd* v. *Crispe*, 5 Taunt. 250.

Remarks upon the doctrine of *Dumpor's case*.

[The doctrine of *Dumpor's case*, namely, that a general condition not to assign without license, is dispensed with by a license to assign *pro hâc vice*, has been much condemned, but the expediency, admitted by all, of adhering to a long established principle, has overcome the repugnance that has been constantly felt to a rule which produced manifest inconvenience and injustice. It is singular, however, that the anxiety which this repugnance might be supposed to create, to discover defects in the doctrine, has not detected a very glaring objection to it, namely, *that the principle, that a condition is indivisible, and cannot be dispensed with partially, has no application in the present instance, in which the condition is not broken, but is performed.* That such is the case here, will be obvious on a moment's consideration. Where a lessee, upon whom is imposed a condition not to assign without license, assigns with the license of the lessor, he does that which the condition requires, and therefore it remains unbroken. The act of assigning with license, is a compliance with the requisitions of the condition, not a breach: as there is no breach of the condition, of course there can be no dispensation with it.

[The case in question has been confounded with instances in which the lessor authorizes the lessee to do an act, the doing of which would be a breach of the condition, whether done with his license or not, but, of which breach he is precluded from availing himself by his assent; as, if the condition provided for the cesser of the lease on the conversion of pasture-land to tillage, and the lessor granted to the lessee a license to make this conversion as to a certain portion of the land, in which case the condition would undoubtedly be gone *in toto*, since the lessor had partially dispensed with the condition; but if, on the other hand, the terms of the condition had been, that the lessee should not convert to tillage, *without license*, and the lessor gave such license to the lessee, the case would be exactly analogous to the actual circumstances of *Dumpor's case*, to which we have seen the same principle has been applied, *though the license is a performance of, and not a dispensation with, the condition.*

[Whether a doctrine, fortified, as that of *Dumpor's case* is, by long acquiescence and reiterated confirmation, could now be shaken by an exposure of the unsoundness of its principle, is doubtful. Certainly no lessor, who has given a license to assign, should be advised to dispense with a de-

feazance reviving the condition, in dependence on any such hypothesis, however disposed he may be to avail himself of the reasoning that has been suggested in order to sustain a condition which otherwise his antecedent acts have rendered nugatory].

REVIVING THE CONDITION OF A LEASE.

DEFEAZANCE *reviving the Condition of a Lease for Years, after an Assignment with the Consent of the Lessor* (*a*).

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THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*purchaser*], of &c., of the one part; and [*lessor*], of &c., of the other part: WHEREAS, by indenture bearing date on or about the —— day of ——, 18—, and made between the said [*lessor*], of the one part; and [*lessee*], of &c., of the other part; the said [*lessor*] did demise and lease unto the said [*lessee*], his executors, administrators, and assigns, *All that* piece or parcel of land, situate, &c., with the appurtenances; *To hold* unto the said [*lessee*], his executors, administrators, and assigns, thenceforth (*or* from the —— day of —— then last past, *or* next ensuing) for the term of —— years; *At* the clear yearly rent of —— pounds, payable quarterly as therein mentioned, and *Under* and subject to several covenants, conditions, and agreements therein contained on the part of the said [*lessee*], his executors, administrators, and assigns, to be paid, observed, performed, and kept; such conditions being to the same effect as the conditions in the defeazance hereinafter contained. AND WHEREAS by indenture of assignment, bearing even date with, and executed immediately before the execution of these presents, and made between the said [*lessee*], of the first part; the said [*lessor*], of the second part; and the said [*purchaser*], of the third

Parties.

Recital of lease for years.

Recital of assignment of lease with lessor's consent.

[(*a*) This defeazance is sometimes inserted in the assignment to the purchaser. See precedent, *post*, Vol. 7, p. 498].

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part; for the considerations therein mentioned, the said [*lessee*], with the license and consent of the said [*lessor*], testified by his execution thereof, hath assigned, transferred, and set over unto the said [*purchaser*], his executors, administrators, and assigns, *All that* the said piece

[*61] *or parcel of land, with the appurtenances; *To hold* unto the said [*purchaser*], his executors, administrators, and assigns, for and during all the unexpired residue and remainder of the said term of —— years; *Subject* to the rent, covenants, conditions, and agreements, in the said indenture of lease reserved and contained on the part of the said [*lessee*], his executors, administrators, and assigns, to be paid, observed, performed, fulfilled, and kept.

Recital of agreement by purchaser to execute defeazance reviving condition.

AND WHEREAS at the time of the execution of the said indenture of assignment, it was agreed by and between the parties to these presents, that immediately after the execution thereof, the said [*purchaser*] should execute the defeazance hereinafter contained.

Testatum.

Defeazance reviving condition giving a right of re-entry, if rent should be in arrear:

NOW THIS INDENTURE WITNESSETH, that, in pursuance and performance of the said agreement on the part of the said [*purchaser*], he the said [*purchaser*] doth hereby for himself, his executors, administrators, and assigns, grant unto the said [*lessor*], his heirs, and assigns, That if the said yearly rent of —— pounds, reserved in and by the said in part recited indenture of lease, or any part thereof, should be behind and unpaid by the space of twenty-one days next after any of the days therein appointed for payment thereof, and the same rent should be lawfully demanded upon or at any time after the expiration of the said twenty-one days, and not paid when demanded; *or* if the said [*purchaser*], his executors, administrators, or assigns (*a*), should at any time or times, during the continuance of the said term of —— years, let, set, underlet, or assign over the said indenture of lease, or the term, estate, or premises thereby granted, or any part thereof respectively, or otherwise part with his

if premises should be underlet or assigned without license:

(*a*) It is optional with the lessor, whether he will or will not take advantage of a forfeiture; and, therefore, it is proper to name *assigns*.

or their interest therein, or thereto, to any person or persons whomsoever, without the license and consent of the said [*lessor*], his heirs or assigns, in writing under his or their hand or hands for that purpose first had and obtained: *Or* if the said [*purchaser*], his executors, administrators, or assigns, should at any time, during the said term *of —— years, do or suffer to be done, any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof, the said in part recited indenture of lease, or his or their estate, term, or interest therein, or in the said premises thereby demised, or any part thereof respectively, shall or may be taken possession of, or disposed of, under, or by virtue of any judgment, extent, or execution, or any statute of bankruptcy, or for the relief of insolvent debtors: *Or* if the said [*purchaser*], his executors, administrators, or assigns, should not well and truly observe, perform, fulfil, and keep all and every the covenants, articles, clauses, conditions, and agreements, in the said in part recited indenture of lease expressed and contained, on the part and behalf of the said [*lessee*], his executors, administrators, and assigns, henceforth (*or* from the —— day of —— now next ensuing), to be performed and kept, according to the true intent and meaning thereof, and of these presents; *Then*, and thenceforth, and in any or either of the said cases, it shall and may be lawful to and for the said [*lessor*], his heirs, or assigns, into and upon the said piece or parcel of land, or any part thereof in the name of the whole, wholly to re-enter, and the same and every part thereof, to have again, retain, repossess, and enjoy, as in his and their first and former estate or right; and the said [*purchaser*], his executors, administrators, or assigns, and all other tenants or occupiers of the said premises, thereout and thence utterly to expel, put out, and remove; [*And* that from and after such re-entry made, the said in part recited indenture of lease, and every clause, article, and thing therein contained, on the part and behalf of the said [*lessor*], his heirs, and assigns, thenceforth to be done and performed, shall cease, determine, and be utterly void, to all intents and purposes whatsoever], any thing in the said indenture

REVIVING THE CONDITION OF A LEASE.

if premises should be disposed of under an execution, bankruptcy, or insolvency:

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or on breach of covenants.

REVIVING THE CONDITION OF A LEASE.

of lease, or in the said indenture of assignment, or in these presents contained to the contrary thereof, in anywise notwithstanding (*b*). In witness, &c.

(*b*) Some gentlemen add a covenant by the purchaser, that he, his executors, or administrators, will, "during the residue of the term, or which shall first happen, until he or they shall have assigned the premises, with such license and consent, as aforesaid," pay the rent, and perform the covenants. But *quære* the necessity, where all the premises in the lease are assigned to one purchaser.

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REVIVING CONDITION OF LEASE BY LESSEE, AND PURCHASER OF PART OF THE PREMISES; AND COVENANTS BY EACH TO PAY HIS APPORTIONED RENT.

DEFEAZANCE *reviving the Condition of a Lease for Years, by a Lessee, and a Purchaser of Part of the Premises demised; and Covenants by each to pay the apportioned Rent, and perform the Covenants, as to the Premises held by them respectively.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, Between [*lessee*], of &c., of the first part; [*purchaser*], of &c., of the second part; and [*lessor*], of &c., of the third part:

Recital of lease, and assignment of part of the premises with lessor's consent.

Whereas (*recite lease to lessee; and assignment to purchaser of part of the premises, with lessor's consent*, ut ante, p. 60. Subject *to apportioned rent, and subject to the covenants, so far as relates to the part assigned*, ut ante, Vol. II. p. 562).

Recital of agreement by lessee, and purchaser, to revive condition and covenant for payment of rent, &c., so far as relate to the premises held by each.

And whereas, at the time of the execution of the said indenture of assignment, it was agreed by and between the parties to these presents, that, immediately after the execution thereof, the said [*lessee*] and [*purchaser*] should respectively revive the condition of the said indenture of lease and covenant for the payment of the said apportioned rent of —— pounds, (being part of the said yearly rent of —— pounds), and for the performance of the covenants, conditions, and agreements in the same indenture of lease contained, so far as the same relate to the premises held by them respec-

tively. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement on the part of the said [*lessee*], he the said [*lessee*], doth by these presents, for *himself, his executors, and administrators, grant unto the said [*lessor*], his heirs, and assigns, That if the said apportioned yearly rent or sum of ——, or any part thereof, shall be behind and unpaid by the space of twenty-one days next after any of the days appointed for the payment of the said rent of —— [*original rent*], in and by the said in part recited indenture of lease, and the said rent of [*apportioned rent*] should be lawfully demanded upon or at any time after the expiration of the said twenty-one days, and not paid when demanded: *Or*, if the said [*lessee*], his executors, administrators, or assigns, shall at any time or times, during the continuance of the said term of —— years, let, set, underlet, or assign over the said messuage, or tenement, and premises, so retained by him the said [*lessee*] as aforesaid, or the term, estate, or interest of the said [*lessee*] therein, or in any part thereof respectively, or otherwise part with his or their interest therein, or thereto, to any person or persons whomsoever, without the license and consent of the said [*lessor*], his heirs, or assigns, in writing under his or their hand or hands, for that purpose first had and obtained: *Or*, if the said [*lessee*], his executors, administrators, or assigns, shall at any time, during the said term of —— years, do or suffer to be done, any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof the said messuage or tenement and premises, so retained by him the said [*lessee*], as aforesaid, or his or their estate, term, or interest therein, or in any part thereof respectively, shall or may be taken possession of, or disposed of, under or by virtue of any judgment, extent, or execution, or any statute of bankruptcy, or for the relief of insolvent debtors: *Or*, if the said [*lessee*], his executors, administrators, or assigns, shall not well and truly observe, perform, fulfil, and keep all and every the covenants, articles, clauses, conditions, and agreements, in the said in part recited indenture of lease expressed and contained, on the part and behalf of the said [*lessee*], his executors, administra-

REVIVING CONDITION OF LEASE BY LESSEE, AND PURCHASER OF PART OF THE PREMISES; AND COVENANTS BY EACH TO PAY HIS APPORTIONED RENT.

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Testatum.

Defeazance reviving condition by lessee as to the part retained by him, giving a right of re-entry, if apportioned rent should be in arrear:

if premises should be underlet, or assigned without license;

if premises should be disposed of under an execution, bankruptcy, or insolvency:

or on breach of covenants.

RRVIVING CONDITION OF LEASE BY LESSEE, AND PURCHASER OF PART OF THE PREMISES; AND COVENANTS BY EACH TO PAY HIS APPORTIONED RENT.

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tors, and assigns, henceforth (*or* from the —— day of —— now next ensuing), to be performed and kept according to the true intent and meaning thereof, and of these presents, so far as such *covenants, articles, clauses, conditions, and agreements, relate to, or concern, or ought to be kept, done, and performed, in respect or on account of the said messuage, or tenement, and premises, so retained by the said [*lessee*], as aforesaid; *Then*, and thenceforth, and in any or either of the said cases, it shall and may be lawful to and for the said [*lessor*], his heirs, or assigns, into and upon the said messuage, or tenement, and premises, so retained by the said [*lessee*], as aforesaid, or any part thereof in the name of the whole, wholly to re-enter, and the same and every part thereof to have again, retain, repossess, and enjoy, as in his and their first and former estate or right, and the said [*lessee*], his executors, administrators, or assigns, and all other tenants, or occupiers of the said premises, thereout and thence utterly to expel, put out, and remove. *(Add covenant from lessee to lessor to pay apportioned rent, and to perform covenants of the lease, so far as they relate to the premises retained*, ut ante, Vol. II. pp. 564, 566.)

Covenant by lessee to pay apportioned rent, and perform covenants as to part retained.

Second Testatum.

AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance of the said agreement on the part of the said purchaser, he the said [*purchaser*] doth by these presents, &c. *(revive the condition as to the part* " so assigned to the said [*purchaser*], as aforesaid;" *and add covenant from purchaser to lessor to pay apportioned rent, &c.* ut supra, mutatis mutandis). IN WITNESS, &c.

Defeazance reviving condition by purchaser as to the part assigned to him.

Covenant by purchaser to pay apportioned rent, &c. as to his part.

DEFEAZANCE *on a Bond* (*a*), *where a Policy of Insurance has been effected as a collateral Security for the Principal and Interest.*

MEMORANDUM. The within-mentioned bond, and the within-mentioned policy of assurance, are given and effected only as a security for the sum of five hundred pounds, and interest thereon, after the rate of five pounds *per centum per annum; And* after full payment thereof, and all costs, charges, damages, and expenses respecting, or in anywise concerning the recovery thereof, the within-named [*obligee*], his executors, administrators, and assigns, shall stand possessed of the said policy of assurance, and the benefit thereof, *In trust* for the within-named [*obligor*], his executors, administrators, and assigns.

WITNESS. [*Obligee*].

(*a*) See further as to DEFEAZANCE, INDEX to the PRECEDENTS, title DEFEAZANCE.

DIRECTION.

TO TRUSTEES TO CONVEY LANDS UPON TRUST, TO RAISE AN ANNUITY FOR A LADY.

DIRECTION *under a Power contained in a Will, that the Trustees should convey such a Part of the Lands devised, as should be of the yearly Value of* 150*l*., *clear of all Deductions, so as that an intended Wife should, in case the Marriage took Effect, and she survived her Husband and two other Persons, yearly receive the* 150*l*.

Formulæ.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [B. G.], the wife of [J. G.], of &c., esquire, *Sendeth Greeting*. WHEREAS [*testator*], late of, &c., esquire, made and published his last will and testament in writing, bearing date the —— day of ——, 18—, and after giving several annuities, gave, devised, and bequeated *All* his lands, &c., unto [*trustee*], of &c., esquire; and [*trustee*], of &c., esquire: *To hold* to them, their heirs, executors, administrators, and assigns, for ever; *Upon trust* that they the said [*two trustees*], and the survivor of them, and the heirs of such survivor, should stand seised and possessed of all his said freehold estates, &c. *Subject* nevertheless, to the said annuities. *In trust* to permit and suffer his sister the said [B. G.] and her assigns, to receive and take to her and their own use and uses, the rents, interest, dividends, profits, and produce thereof, for and during the term of her natural life; *And* he thereby directed, that her receipts and discharges, notwithstanding her coverture, should be sufficient discharges for the same. AND from and after the decease of his said sister [B. G.], then, *In trust* to pay and apply, [*68] *convey and dispose of his said freehold estates, &c. *Subject* nevertheless to the said annuities, unto such person or persons, and for such estate and estates, and at such

Recital of will, whereby testator gave all his lands, &c., to two trustees, upon certain trusts.

time and times, and in such manner and form as the said sister [B. G.], notwithstanding her coverture, by any deed or writing duly executed, or by her last will and testament, to be duly executed, should direct, limit, or appoint. And he did thereby nominate and appoint the said [two trustees], executors of his said will. And whereas the said [testator] departed this life, on or about the —— day of ——, 18—, without altering or revoking his said will. And whereas the said [two executors] proved the same will in the Prerogative Court of the Archbishop of Canterbury. And whereas a marriage hath been agreed upon, and is intended to be shortly had and solemnized, between [intended husband], nephew of the said [B. G.] and [intended wife], spinster, eldest daughter of [Sir J. S. A.], baronet, deceased. And whereas, upon the treaty for the said intended marriage, the said [B. G.] did agree to secure to be paid to the said [intended wife], and her assigns, during her life, in case the said intended marriage should take effect, and she the said [intended wife] should survive the said [intended husband], [B. G.] and [J. G.] a clear annual sum of one hundred and fifty pounds, in manner hereinafter mentioned. NOW THESE PRESENTS WITNESS, that, in pursuance and performance of the said agreement, and in consideration of the natural love and affection which the said [B. G.] hath for the said [intended husband], her nephew, and in prospect and consideration of the said intended marriage, She the said [B. G.], pursuant to and by force and virtue, and in exercise and execution of the power or authority to the said [B. G.] given by the said in part recited will of the said [testator], and of all other powers and authorities enabling her in that behalf, *Doth*, by this deed or writing, duly executed by her, direct the said [two trustees], their heirs and assigns, to convey, settle, and assure, such and so many, and such part or parts of the lands, tenements, and hereditaments, so by the said will of the said [testator] devised to the said [two trustees], *and their heirs, *In trust* as aforesaid, as shall be of the yearly value of one hundred and fifty pounds, clear of the land-tax, and all other taxes, reprizes, and deductions whatsoever, So, and in such manner, as that the said [intended wife], and her assigns, shall

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TO TRUSTEES TO CONVEY LANDS UPON TRUST, TO RAISE AN ANNUITY FOR A LADY.

and may (in case the said intended marriage shall take effect, and she shall survive all of them the said [*intended husband*], [B. G.], and [J. G.]), from and immediately after the decease of the longest liver of them the said [*intended husband*], [B. G.], and [J. G.], yearly, and every year, have, receive, take, and enjoy, during the term of her natural life, by and out of the rents, issues, and profits of the said lands, tenements, and hereditaments, the yearly sum of one hundred and fifty pounds, of lawful money of Great Britain, clear of the land-tax, and all other taxes, reprizes, and deductions whatsoever; to be paid and payable by four even and equal quarterly payments, in every year; the first quarterly payment thereof to be made at the end of three calendar months, to be computed from the time of the decease of the longest liver of them the said [*intended husband*], [B. G.], and [J. G.] IN WITNESS, &c.

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DISCLAIMER.

WHEN an estate is conveyed or devised to one or more persons, he or they may by deed disclaim the conveyance or devise, provided no act has been done to shew an assent. In the case of two or more persons, provided they are joint-tenants, the estate will entirely vest in those who have not disclaimed. But if all the grantees or devisees disclaim, then, as well as when a single grantee or devisee disclaims, the estate will descend to, or vest in the heir of the grantor or devisor. And in case there are trusts created by the grant or devise, the Court of Chancery will enforce the execution of the trusts.

One trustee for the sale of an estate, having released, and conveyed to his co-trustee, refused to join in

In the case of *Crewe* v. *Dicken*, 4 Ves. 97, Mrs. Crewe conveyed an estate to the use of herself for life, remainder to three persons, their heirs, and assigns, in trust to sell; with a proviso that the receipts of those three persons should be a sufficient discharge to the purchasers. One of the trustees died; another, refusing to act, *conveyed* his interest to the remain-

ing trustee, who sold the estate. The purchaser refused to take the title, unless the trustee who had conveyed his interest would join in the receipt for the purchase-money, which he declined. Lord *Rosslyn* said, he must allow the objection: if the trustee had renounced, he might dissent; for then the whole estate would have been in the remaining trustee. But according to the way they had managed it, he had accepted the trust, and conveyed away the estate. That part of the trust that consisted in the application of the money, he could not convey away. The purchaser, taking the title with the knowledge of the trust, would be bound to see to the application of the money.

the receipt for the purchase-money; upon the special expression of the deed, the purchaser was not held to the agreement with the remaining trustee: it would have been otherwise if the trustee had merely renounced.

In *Townson* v. *Tickell*, 3 Barnw. & Ald. 36, Lord Chief Justice *Abbott* said, the law certainly is not so absurd as to force a man to take an estate against his will. *Primâ facie*, every estate, whether given by *will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge; and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift. The question here is, in what mode that refusal is to be made. In this case, the renunciation has been by deed under the hand and seal of the party. It has been argued, however, that nothing short of renunciation or disclaimer in a court of record will avoid the devise; and if there had been any distinct authority to that effect, we should have been bound to give due weight to such authority. It does not seem to me, however, that the cases have gone the length of deciding that the renunciation must take place in a court of record. The learned counsel has not been able to suggest any mode by which the devisee could have disclaimed in a court of record; and certainly it could not be done, unless some other person had thought fit to cite him there, to receive his disclaimer; and if the estate were *damnosa hæreditas*, that would not be likely to happen. It might, therefore, in some instances, be a matter of difficulty to make a disclaimer in a court of record. The case of *Thomson* v. *Leach*, 2 Vent. 198, seems to me to be a strong authority to shew that it is not necessary. Three of the judges there held, that an estate did not pass by surrender to the surrenderee till he expressly accepted it. Mr. Justice *Ventris* differed, and held that it passed immediately, liable to be divested by the dissent of the surrenderee. His judgment is, however, wholly founded on this, that a party to whom an estate is given, must be taken to give an implied assent to that which is for his benefit, till the contrary appears. That learned Judge expressly states, that a man "cannot have an estate put into him in spite of his teeth." I concur in that opinion, and think that the renunciation here, having been by deed under the hand and seal of the party, must have the effect of making the devise with respect to him null and void, and, consequently, that there must be judgment for the plaintiff.

A devisee in fee may by deed, without matter of record, disclaim the estate devised.

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And Mr. Justice *Bayley* said, I am of the same opinion. There are

many instances in which a devise to a party might subject him to great inconvenience; as, for instance, a devise of an estate clothed with trusts. And as, in such a case, a party cannot be forced to be a trustee, it would be absurd that the estate should be in him, and remain in him, until he can prevail upon some person to institute certain legal proceedings under which he is to disclaim in a court of justice. The good sense of the thing is quite the other way; the law indeed presumes, that the estate devised will be beneficial to the devisee, and that he will accept *of it, until there is proof to the contrary. Here is a renunciation by a most solemn act, *viz.* by deed; and by that he has said, that he did not choose to accept that which is devised to him. It seems to me, that the effect of that is, that the estate was never in him at all. For I consider the devise to be nothing more than an offer which the devisee may accept or refuse; and if he refuse, he is in the same situation as if the offer had never been made; and that being so, I am of opinion, that the disclaimer in this case was sufficient, and that there ought to be judgment for the plaintiff. And in that opinion Justices *Holroyd* and *Best* concurred.

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Effect of a disclaimer by a trustee, and of a release with intent to disclaim.

In *Nicloson* v. *Wordsworth*, 2 Swans. 365, a trustee and executor of a will renounced probate, and declined to act in the trusts of the will, and executed an indenture of release, whereby he bargained, sold, released, quitted claim, and conveyed to the other two trustees, their heirs and assigns, all and singular the lands, tenements, and real estate of the testator. The remaining two trustees sold part of the property, but the purchaser refused to complete the purchase, unless the other trustee joined in the conveyance. On a bill by the purchaser for specific performance, it was contended for the plaintiff, that the release executed by the trustee was an acceptance of the estate devised to him, and he was therefore a necessary party to the conveyance; and that the deed admitted that an estate vested in him. Of that estate he was a trustee; and it was not competent to him, after he had assumed that character, to renounce it without performance of its duties: and for that reason the release could not operate as a disclaimer. For the defendants it was insisted, that, in a court of equity, at least, the intention of the parties determined the effect of the instrument; and that a release, with the purpose of disclaiming, would be equivalent to a disclaimer. The Lord Chancellor *Eldon* said, "The question is curious as a point in conveyancing. It seems to have been taken for law, from an older period than the date of *Crewe* v. *Dicken*, 4 Ves. 97, and sanctioned by Lord *Hale*, *Smith* v. *Wheeler*, 1 Vent. 128, that if an estate is conveyed to two persons in trust, and one will not act as trustee, the estate vests in the other. If, therefore, the party execute a simple instrument, and, under his hand and seal, declare that he disclaims, that is, dissents, from being a trustee, the fact must be taken to be that he is no trustee. But in *Crewe* v. *Dicken* the difficulty occurred, that, instead of doing this, the party conveyed his estate to the other trustees. Lord

Loughborough thought that that was different from a mere disclaimer, because he could not execute a release without having assented to the conveyance to himself. In that case there were also specialties: *the individuals were particularly described, and the directions for the form of the receipt were such as made it impossible that a proper receipt could be given, unless the trustee, who had disclaimed, joined. If the essence of the act be disclaimer, and if the point were *res integra*, I should be inclined to say, that if the mere fact of disclaimer be to remove all difficulties, and vest the estate in other trustees, a party who releases, and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee. The answer, that the release amounts to more than a disclaimer, is much more technical than any reasoning that deserves to prevail in a court of equity. If the contract were mine, and I approved the bargain, I should abide by it; but that opinion will not assist the party." On a subsequent day his Lordship said, "Either the plaintiff must take such title as the parties with whom he has contracted can give him, or he cannot have a conveyance. If the vendors had been plaintiffs, the Court must have determined whether the title was good; here the purchaser claims specific performance, at the same time insisting that his vendors cannot make a good title. If I could have considered this deed as a mere deed of disclaimer, then, on the authority of Lord *Hale*, *Smith* v. *Wheeler*, 1 Vent. 128, 2 Keble, 772, and subsequent cases, though I do not understand the principle, I might have held that the two other trustees could make a good title; but a release, referring to an interest which the releasor supposes to be in him, introduces the doubt in *Crewe* v. *Dicken*. The question is, whether the three parties must join in the conveyance and receipt? A release is the instrument of a person who thinks that he has something to part with; it is not a mere dissent or refusal to concur. I argued the case of *Crewe* v. *Dicken* on various grounds, and I recollect that the words relative to the receipt were very special. The more one examines the distinction between disclaimer and release, the less one sees the worth of it. In this will the testator declares that the receipt of the trustee or trustees for the time being shall be a sufficient discharge; but the shape of the record is such, that I cannot decide the question. My opinion is, that if a person, who is appointed co-trustee by any instrument, execute no other act than a conveyance to his co-trustees, where the meaning and intent of that conveyance is disclaimer, the distinction is not sufficiently broad for the Court to act upon. What is the thing called a disclaimer? I have seen some, prepared by the ablest conveyancers, in a form like this: 'I hereby declare that I have disagreed, and hereby disagree, &c. and hereby disclaim, &c.' What is the effect of that? That is sufficient. I can find *no case which has decided, nor can I see any reasons for deciding, that where the intent of the release is disclaimer, the inference that the releasor has accepted the estate shall prevent the effect of it. The decree in *Crewe* v. *Dicken* did not proceed on

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that point only: the words describing the persons by whom the receipt was to be given were very special. In that case, if two out of the three trustees had died, the third having previously released to them, beyond doubt that survivor must, under the words, have given the receipt, though he did not continue trustee. I think there is no case in which judgment has been pronounced on the distinction between a disclaimer and a release; and that, where the intention is disclaimer, there ought to be no distinction. I understand the operation of a release with intent to disclaim, but it is difficult to know what that thing called a disclaimer is.

Disclaimer under a conveyance to uses.

"The case in Ventris is an assignment of a lease to two persons, one of whom expresses his dissent; but if we consider the difficulty attending conveyances to uses, I think that we shall be compelled to say, that Lord *Hale's* doctrine will not apply, and that the party cannot disclaim in the case of a conveyance to uses, except by release with intent of disclaimer. I am aware, however, that, from the practice of conveyancers, if I were to say that, on any difficulty in principle, a disclaimer could not be effectual, I should shake titles innumerable."

The following decree was taken by consent:—"It appearing to the Court, that the release, bearing date the 23rd of December, 1816, was meant to operate as a disclaimer, his Lordship doth declare, that the defendant (the trustee who declined to act) is not a necessary party to the conveyance: and it is ordered, that the plaintiff's bill be dismissed with costs; and it is ordered, that all proceedings in the ejectment be stayed, the plaintiff undertaking to complete the purchase."

In *Adams* v. *Taunton*, 5 Madd. 435, it was held by Vice-Chancellor *Leach*, that a trustee of real estate for sale, who has renounced his trust, is not a necessary party in a conveyance to a purchaser; nor is it necessary that he should join in a receipt for the purchase-money.

Disclaimer should be by deed-poll, and not by indenture.

The first form, under this title, is a deed-poll, which, it is thought, is the most proper form. When the only trustee disclaims, or when all the trustees disclaim, it seems, that a deed-poll is the only form that can, with propriety, be used. All the other forms are by indenture, and the disclaimer is said to be with the privity of the continuing trustees. The privity of the continuing trustees, or of any other persons, is not necessary; and it appears strange, that the generality of the conveyancers of the present

[*75] day should have adopted that form. For it is *evident that a trustee may disclaim without the consent or privity of any person. In one form, the disclaiming trustee disclaims *unto* the continuing trustees. That form, it is conceived, ought not to be adopted, because it seems to be something like a release.

All the forms have been inserted, in order that the student might see the different methods pursued by different conveyancers.

DISCLAIMER *by Deed Poll, by One of Two Trustees under a Will.*

BY DEED POLL BY ONE OF TWO TRUSTEES.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*disclaiming trustee*], of &c. *Sendeth Greeting*. WHEREAS [*testator*], late of &c., deceased, duly made and published his last will and testament, bearing date on or about the —— day of ——, 18—; And after thereby giving divers pecuniary and specific legacies to the several persons therein mentioned, the said testator gave all his real estates to the said [*disclaiming trustee*] and [*continuing trustee*], of &c., and their heirs, upon trust, &c. *(Recite the trusts fully)*; And the said testator appointed the said [*trustees*] executors of his said will: AND WHEREAS the said [*testator*] departed this life some time in the month of ——, in the year 18—, without having revoked or altered his said will: AND WHEREAS the said [*disclaiming trustee*] having declined to act, and being anxious to renounce the executorship and trusts of the said will, the said [*continuing trustee*] hath alone proved the said will in the —— Court of ——. NOW KNOW YE, that I, the the said [*disclaiming trustee*], do, by these presents, absolutely and irrevocably disclaim *All* the real and personal estates, trusts, powers, and authorities whatsoever, in and by the said recited will of the said [*testator*], devised, and bequeathed, or given to the said [*disclaiming trustee*], and [*continuing trustee*], and their heirs, as aforesaid. IN WITNESS, &c.

Exordium.

Recital of will.

Death of testator.

Recital that disclaiming trustee having declined to act, the other trustee proved the will.

Disclaimer.

OF A DEVISE UPON TRUST.

DISCLAIMER *by One of Two Trustees of a Devise of Lands upon Trust to sell, &c.*

Parties.

Recital of will, with power of sale, &c.

THIS INDENTURE, made the —— day of ——, 18—; BETWEEN [*disclaiming trustee*], of &c., of the one part; and [*continuing trustee*], of &c., of the other part. WHEREAS [*testator*], late of &c., deceased, duly made his last will and testament in writing, bearing date on or about the —— day of ——, 18—, and did thereby, after appointing the said [*two trustees*], executors of his said will, authorize, empower, and direct his said executors, as soon after his death as conveniently could be, absolutely to sell and dispose of all and singular his messuages &c., situate &c., or elsewhere, with the appurtenances (except &c.), unto any person or persons whomsoever, for the most money that could or might be reasonably had or gotten for the same; and either by public auction &c., and either altogether, or in parcels; and to convey the said premises, when sold, to the purchaser or purchasers thereof, or to such uses, &c., as such purchaser or purchasers should direct or appoint; *And* to receive and give discharges for the purchase monies; *And* the said testator declared his will to be, that the receipt of his said executors, for such purchase-money, should be good and sufficient discharges to the person or persons paying the same; *And* that such person or persons should not afterwards be accountable for the loss, misapplication, or non-application of such purchase-money, or concerned to see to the application thereof: AND the said testator desired his said executors to carry into execution certain contracts or agreements in the said will mentioned, and to convey the hereditaments, the subject of such contracts, to the purchasers thereof, and to receive and give discharges for
[*77] the purchase-money *for the same: AND he declared that the monies to arise and be produced from the sale of the said premises, and from the rents and profits thereof,

OF A DEVISE UPON TRUST.

until sale, should become part of the residue of his personal estate; and after payment of his debts, legacies, and funeral and testamentary expences, he gave all his personal estate and effects unto —— his wife, her executors, and administrators absolutely. AND WHEREAS the said [*testator*] departed this life, on or about the —— day of, 18—, without having altered or revoked his said will: AND the said [*disclaiming trustee*], having refused to act in proving the said will, and being desirous to renounce the executorship thereof, and all the trusts, powers, and authorities thereby reposed in, or given to him, he the said [*continuing trustee*] hath alone proved the said will of the said [*testator*], in the Prerogative Court of the Archbishop of Canterbury, on or about the —— day of ——, 18—. NOW THIS INDENTURE WITNESSETH, that he the said [*disclaiming trustee*], with the privity of the said [*continuing trustee*], (testified by his executing these presents) *hath*, absolutely and irrevocably renounced and disclaimed, *and* by these presents *doth* absolutely and irrevocably renounce and disclaim [unto the said [*continuing trustee*], his heirs, executors, administrators, and assigns], ALL the real and personal estates, trusts, powers, and authorities whatsoever, by the said hereinbefore recited will of the said [*testator*], deceased, given, devised or bequeathed to the said [*disclaiming trustee*], jointly with the said [*continuing trustee*], or otherwise howsoever; AND all trusteeship, in respect thereof; AND all rights, powers, and privileges thereunto relating, or in anywise belonging or annexed. IN WITNESS, &c.

Recital of testator's death.

That disclaiming trustee, being desirous to renounce, continuing trustee had proved the will.

Testatum.

[78]

OF DEVISE UPON TRUST, AND OF GUARDIANSHIP.

DISCLAIMER *by One Trustee of a Devise and Bequest of Lands, &c., and of the Guardianship of the Testator's Children.*

THIS INDENTURE, made the —— day of ——, 18—; BETWEEN [*disclaiming trustee*], of &c., of the one part;

Parties.

OF DEVISE UPON TRUST, AND OF GUARDIANSHIP.

and [*three continuing trustees*], of &c., of the other part. WHEREAS [*testator*], of &c., deceased, by a certain deed of disposition, bearing date the —— day of ——, 18—, and executed according to the laws of Scotland, did, in the event of his decease, nominate and appoint the said [*two of the continuing trustees*], as persons to be assumed as trustees, in manner thereinafter mentioned, to be his executors, and sole intromeiers with his whole personal estate and effects; *And* thereby secluded and debarred his nearest of kin, and all other persons, from the said office; AND in the event of his death, before his said trustees should have reconveyed the lands and other subjects therein described to him, the trustees or trustee acting for the time when such event should take place, should be bound and obliged to assume as trustees the persons whom he had already nominated, or whom he might thereafter nominate as tutors and curators to his children, and who should accordingly be assumed as trustees, upon production of a deed under his hand, nominating such tutors and curators. AND WHEREAS the said [*testator*] duly signed and published his last will and testament in writing, as to his real and personal estate in America, bearing date the —— day of ——, 18—, whereby he gave, devised, and bequeathed unto the said [*four trustees*], their executors, administrators, and assigns, *All* and singular the messuages or tenements, farms, lands, hereditaments, and real estate or property whatsoever, and wheresoever, [*79] in *America, or the West Indies, of or to which, he, the testator, or any person or persons in trust for him, was or were, or at the time of his decease, should be seised or possessed for any estate of freehold and inheritance, or of freehold only, or for any term or terms for years, and which he had a right to devise, bequeath, or otherwise dispose of by that his will, or which he was authorized to dispose of by any special power, with their rights, members, and appurtenances, (and meaning and intending to include in that devise all such estates or interests in America, or the West Indies, as were or should be vested in him by way of mortgage); *And also*, all and singular sums of money, and debts, in America or the West Indies, which should be owing to him at the time of his de-

Recital of will, first as to Scotch property.

And nomination of tutors and curators to children.

Recital of will as to estate in America or the West Indies,

(including mortgages).

And all monies, debts &c., in America, or the West Indies, which should be

cease, by way of mortgage bond or simple contract, or otherwise, and by shares in the American stocks or funds, and the interest, dividends, and annual produce thereof, And all other his personal estate and effects whatsoever, in America or the West Indies, and all mortgages, bills, bonds, instruments, and writings respecting the same real or personal estates, effects, and property. *To have, hold,* receive, and take the same premises, and every part or parcel of the same, unto and to the use of the said [*four trustees*], their executors, administrators, and assigns, *Upon* and for the trust, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations therein expressed and contained of and concerning the same: *And* the said testator thereby appointed the said [*four trustees*] executors of his said will, so far as related to his property in the West Indies. And whereas the said [*testator*], by a deed-poll, or instrument in writing, bearing even date with his said in part recited will, [pursuant to, and by force and virtue, and in exercise and execution of the power or authority for that purpose given or limited by an act of Parliament, made and passed in the 12th year of the reign of his majesty King Charles II., intitled "An Act of Parliament for the taking away of wards and liveries, and tenures *in capite*, and by knight's service, and for settling a revenue upon his Majesty in lieu thereof," and of every other power and authority enabling him in that behalf,] *He*, the said [*testator*], did appoint the said [*four trustees*], and the survivors and survivor of them, and the executors and administrators of such survivor, to have the custody, tuition, and guardianship of all the children of his body, who should be living at his decease, or born in due time after, and of the respective estates or effects of the said child or children during their minority or respective minorities. And whereas the said [*testator*] died on or about the —— day of ——, 18—, without having revoked or altered his said will, or the said in part recited appointment of guardianship. And whereas the said [*disclaiming trustee*] hath declined to act in proving the said will of the said [*testator*], and hath not in any manner acted in execution of the trusts of the said will, or in the guardianship

owing to him at his decease;

And all other his personal estate and effects in America or the West Indies.

Habendum to trustees, their executors, &c.

Upon trust.

Appointment of executors, so far as relates to property in West Indies.

Recital of a deed-poll, appointing trustees guardians of children.

Death of testator.

Recital that disclaiming trustee had declined to prove the will, and had not acted in execution

OF DEVISE UPON TRUST, AND OF GUARDIANSHIP.

of trusts of will or guardianship, &c.

And was desirous of disclaiming the estates and trusts vested in him, and the guardianship of the children, &c.

Testatum.

Disclaimer.

of the children of the said [*testator*], or in the trusts of the aforesaid deed of disposition; *And* he is desirous of renouncing and disclaiming the executorship (*a*) of the said will, and the estates and trusts thereby vested and reposed in him as aforesaid: *And* is also desirous of renouncing and disclaiming the guardianship of the children of the said [*testator*], and the trusts of the said deed of disposition. NOW THIS INDENTURE WITNESSETH, that he, the said [*disclaiming trustee*], with the privity of the said [*two of the trustees*], *hath* fully, absolutely, and irrevocably renounced and disclaimed; *And* by these presents *Doth* fully, absolutely, and irrevocably renounce and disclaim, *All* estate, right, title, power, authority, claim, or demand whatsoever, by virtue of or under the said in part recited will of the said [*testator*], of, in, to, out of, or over the messuages, or tenements, lands, hereditaments, goods, chattels, estates, and effects whatsoever, devised or bequeathed by the same will as aforesaid; and all the trusts declared by the same will; and all powers and privileges thereunto relating, or in anywise concerning; *And also* the executorship of the same will; *And also* the guardianship of the children of the said [*testator*], and the trusts of the said deed of disposition; *And all* powers, rights, and

[*81] privileges to the same respectively *belonging, or in anywise appertaining or annexed, in such and the same manner, to all intents and purposes, as if he the said [*disclaiming trustee*] had not been named or mentioned, either in the said in part recited will, or the said in part recited deed poll. IN WITNESS, &c.

Testimonium.

(*a*) The renunciation of the probate is done in the Ecclesiastical Court. See the form, *post*, p. 81. [If the testator were possessed of personal property, (including, of course, under this denomination leaseholds for years), a disclaimer by deed is unnecessary, the renunciation of the executorship in the Ecclesiastical Court is sufficient. But where the will contains a devise of real estate, it is prudent to obtain from the disclaiming trustee a deed of disclaimer as to such estate; for, even though it were quite clear, (as seems to be the better opinion), that a parol disclaimer would be equally operative, yet, as matter of evidence, a disclaimer by deed is always to be preferred].

RENUNCIATION *of the Probate, and Execution of a Will and Codicil, by one of three Executors; and* AFFIRMATION *thereof; and that he has not intermeddled, and will not intermeddle, in the Goods, &c. of the Deceased, with Intention to defraud the Creditors.*

RENUNCIATION OF PROBATE BY EXECUTOR.

ON Saturday, the eleventh day of February, in the year of our Lord 18—, before the Worshipful Samuel Pearce Parson, Doctor of Laws and Surrogate, in his Chambers in Doctors' Commons, London; present the subscribing Notary Public.

A BUSINESS of renouncing the Probate, and Execution of the last Will and Testament and Codicil of [*testator*], late of ——, in the County of ——, deceased, done by [*executor*], one of the Executors named in the said Will.

ON which day, appeared personally the said [*executor*], and alleged that the said deceased departed this life some time since, having duly made and executed his last will and testament, with a codicil in writing, and thereof appointed [*another executor*], this appearer, and [*another executor*], executors; *And* that, in the month of June, 1809, probate of the said will and codicil was granted under seal of this Court to the said [*two other executors*], as two of the executors thereof, a power being reserved of making the like grant to this appearer when *he should apply for the same; *And* that he the appearer, for divers good causes and considerations, him thereunto moving, expressly renounces his right to the said probate; WHEREFORE he prayed, and the Surrogate aforesaid at his petition (he having first duly made and subscribed the usual affirmation or declaration according to act of Parliament), admitted his said renunciation so far as by law the same ought or may be admit-

Act of renouncing probate, and execution of will and codicil by one of three executors.

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RENUNCIATION OF PROBATE BY EXECUTOR.

ted, and thereupon decreed letters testimonial to be made.

Notarial attestation.

Which I attest,

WM. FOX,
Not. Pub.

Affirmation of executor that he renounces the probate and execution of the will;

and that he has not, and will not, intermeddle in the goods, &c. of deceased, with intention to defraud the creditors.

I, [*executor*], being one of the Dissenters from the Church of England, of the Society of Friends, commonly called Quakers, and one of the executors of the last will and testament, with a codicil, of [*testator*], late of &c., deceased, do solemnly, sincerely, and truly affirm and declare, that I renounce the probate and execution of the said will; *And* that I have not intermeddled, and will not intermeddle in the goods, chattels, and credits of the said deceased, with intention to defraud the creditors.

Jurat.

ON the eleventh day of February, 1815, the said [*executor*] duly made and subscribed the above-written affirmation or declaration. } [*Signature of executor*].

Before me,

S. P. PARSON,
Sur.

(Present) WM. FOX,
Not. Pub.

GEO. GOSTLING,
NATH. GOSTLING,
R. C. CRESSWELL, } Deputy Registers.

DISCLAIMER *by one of two Trustees of a Marriage Settlement, of the Conveyance and Trusts, &c. And* AGREEMENT *by the Husband and Wife that all the Trusts, &c. shall be executed by the continuing Trustee, his Heirs, &c.*

BY ONE TRUSTEE OF CONVEYANCE AND TRUSTS OF MARRIAGE SETTLEMENT.

THIS INDENTURE, made the —— day of ——, 18—; BETWEEN [*disclaiming trustee*], of &c., esquire, of the first part; [*husband*], of &c., esquire, and [*wife*], his wife (late [*maiden name*] spinster), of the second part; and [*continuing trustee*], of &c., clerk, of the third part. (*Recital of indentures of lease and release, dated 14th and 15th September*, 1802, *being the settlement on the marriage of husband and wife, stating that by the release estates were granted, &c. to the two trustees;* Habendum *to them, their heirs and assigns,* "*to the uses, upon and for the trusts,* "*intents, and purposes, and with and subject to the powers* "*and provisoes therein declared and contained of and* "*concerning the same, to take effect after the said then* "*intended marriage, for the sole benefit of the lady's fa-*"*ther, (the settlor), and the husband and his then intended* "*wife and their issue, in a course of strict settlement,*" [the uses of the settlement not being set forth]; *and that it was thereby declared, that the two trustees, their executors, &c. should stand possessed of stock in the 3l. per cent. reduced (before recited to have been transferred to them),* "*upon the trusts therein declared thereof, for the benefit,*" *&c. And that lady's father thereby covenanted to pay* 1000*l. to the trustees, their executors, &c.* "*upon the* "*trusts therein declared,*" *&c. Then a recital that the marriage had been solemnized).* AND WHEREAS the said [*disclaiming trustee*] never executed the said recited indentures of lease and release and settlement, or either of them, nor hath he ever accepted or acted in the trusts reposed in him in conjunction with the said [*other trustee*],

Parties.

Recital of marriage settlement.

Recital that disclaiming trustee never executed the settlement, nor accepted or acted in trusts of the will, but wholly declined

BY ONE TRUSTEE OF CONVEYANCE AND TRUSTS OF MARRIAGE SETTLEMENT.

to act, and was desirous to disclaim.

Testatum.

by the said indenture of release and settlement; but on the contrary he hath wholly declined to act therein, and he is desirous, with the concurrence of the several other parties hereto, to make and execute the disclaimer hereinafter contained. NOW THIS INDENTURE WITNESSETH, that the said [*disclaiming trustee*], with the privity and concurrence of the said [*husband*], and [*wife*], his wife, and [*continuing trustee*], testified by their severally executing these presents, *Doth* hereby fully, absolutely, and irrevocably disclaim, unto the said [*continuing trustee*], his heirs, executors, administrators, and assigns, respectively, ALL and singular the manors, messuages, farms, lands, tenements, and hereditaments, by the said indenture of settlement granted and conveyed as well by the said [*wife's father*], and [*wife*], then [*maiden name*], and also by the said [*husband*], unto him the said [*disclaiming trustee*], in conjunction with the said [*continuing trustee*], as aforesaid, together with the conveyance thereof respectively made, as aforesaid, by the same indentures; *And also* all the trusts, powers, and authorities whatsoever, by the same indentures given to or vested in him the said [*disclaiming trustee*], in conjunction with the said [*continuing trustee*], as aforesaid, upon or over the same hereditaments; AND ALSO all and singular the sum of 3000*l.*, *3 per cent.* reduced annuities; and the said sum of 1000*l.* sterling, in and by the said indenture of release, stated to have been transferred, and covenanted to be paid to him the said [*disclaiming trustee*], and the said [*continuing trustee*], as hereinbefore mentioned respectively; together with the said covenant for payment of the said sum of 1000*l.*, and all benefits thereof; and also all the trusts, powers, and authorities given to, or vested in him the said [*disclaiming trustee*], in conjunction with the said [*continuing trustee*], upon or over the said sums of 3000*l.* *3 per cent.* reduced bank annuities, and 1000*l.* sterling, or either of them, as aforesaid, or in anywise relating thereto, *He* the said [*disclaiming trustee*] hereby wholly renouncing, disavowing, and rejecting, all conveyances, covenants, agreements, trusts, and confidences by and for the said indenture of release and settlement, expressed and intended to be respectively made to, entered into

Disclaimer of all the manors, &c., granted by the settlement, trust-monies, and all powers, &c.

with, and reposed in him, in conjunction with the said [*continuing trustee*], or otherwise howsoever. [AND THIS INDENTURE ALSO WITNESSETH (*a*), that, in respect of the premises, and for divers good causes and considerations them hereunto moving, *they*, the said [*husband*] and [*wife*], his wife, *do* hereby consent and agree, that all and singular the trusts, powers, and authorities, by the said recited indenture of release and settlement expressed and intended to be given to or vested in the said [*two trustees*], their heirs, executors, administrators, and assigns, respectively, upon or over the manors, messuages, farms, lands, tenements, hereditaments, stock, money, and real and personal estate, therein comprised or mentioned, but which are now disclaimed by the said [*disclaiming trustee*], as aforesaid, shall be executed and continued by the said [*continuing trustee*], his heirs, executors, administrators, or assigns, respectively, alone, in such and the same or as ample a manner, as if the said [*continuing trustee*] had been the sole trustee named and appointed in and by the same indenture, and the conveyances, covenants, agreements, trusts, powers, and authorities therein respectively contained had been thereby respectively made to, entered into with, and reposed in him the said [*continuing trustee*], his heirs, executors, administrators, and assigns, respectively.] IN WITNESS, &c.

BY ONE TRUSTEE OF CONVEYANCE AND TRUSTS OF MARRIAGE SETTLEMENT.

Further *testatum*.

Agreement by husband and wife that all the trusts, &c., shall be executed by continuing trustee, his heirs, &c.

(*a*) This further *testatum* is perfectly useless, and had better be omitted.

Whether a disclaimer can be made by parol seems to be *vexata quæstio*. An opinion in the affirmative was expressed by Mr. Justice *Holroyd*, in *Townson* v. *Tickell*, 3 Barn. & Ald. 31, but the case did not raise the point. At all events, it must be unequivocal; and therefore, where a devisee refused to take possession, repeatedly expressing her determination not to accept any benefit under the will, for that she was entitled as heir-at-law (which turned out to be erroneous), it was held that this did not amount to a disclaimer, so as to preclude her from subsequently claiming as devisee. *Doe* d. *Smith* v. *Smith*, 6 Barn. & Cress. 112; *S. C.* 9 D. & R. 134. To prevent trustees appointed by deed from disclaiming, which might in some instances be productive of great inconvenience, and even defeat the object of the trust, as in the case of a term assigned to attend the inheritance, in order to bar dower, they should be made to execute the deed.

As to parol disclaimer, and what required to constitute it.

ENFRANCHISEMENT.

See title PURCHASE-DEEDS.

EXCHANGE.

EXCHANGES AT COMMON LAW.

AN exchange is an assurance at common law, by means of which two persons, severally seised of lands, mutually grant them in exchange, each his own land for the land of the other. It seems to have been frequently resorted to in early times, and was indeed obviously adapted to the simple transactions of a people, among whom commerce had not yet introduced wealth, and rendered money the ordinary medium of traffic. Exchanges, properly so called, are at this day fallen much into disuse, not only for the reason just hinted at, but also on account of some inconveniences attending them, which will be presently noticed. As they still, however, occupy a place among the assurances of the land, and are not unfrequently met with in old titles, a brief statement of some of the principal rules respecting them may be useful.

Requisites.

To the validity of exchanges at common law, five things are requisite:—

What things may be exchanged.

1*st*, That the two subjects be of the same nature. Thus, land may be exchanged for land, and chattels for chattels, but not real for personal estate; Perk. Sect. 261, 262, 263; Shepp. Touch. 292; though real estate of one kind may be exchanged for real estate of another kind. Corporeal hereditaments may therefore be exchanged for incorporeal hereditaments, or land for a fee farm rent. Co. Litt. 50. b.

Equality of estate.

2*dly*, That the parties take an equal estate. Thus, an estate in fee cannot be exchanged for an estate for life, or in tail; Co. Litt. 51. a; and so far is this doctrine carried, that it is even said, that an estate *expressly* for life cannot be limited in exchange for an estate *constructively* for life, i. e. without words of limitation; Perk. Sect. 275; Prest. Shepp. Touchst. 296, 298; but this is doubtful.

It is not necessary, however, that the exchanging parties should be *seised* of an equal estate; for if a tenant in tail, or a husband seised in

right of his wife, grant lands in fee in exchange with a tenant in fee, this is a good exchange, until it be avoided by the issue or wife. Perk. Sect. 280, 289; Co. Litt. 50. b. So, a person having a defeasible estate in fee, may exchange with another, whose estate is indefeasible. Ib. And an estate in possession may be exchanged for an estate in reversion. Ib.

EXCHANGES AT COMMON LAW.

And here it may be observed that where an exchange is voidable only, and not void, as in the case of an exchange by an infant, or tenant in tail, the occupation of the exchanged lands by such infant, after his majority, or by the issue in tail, operates as a confirmation of it. Co. Litt. 51. a.

As to voidable exchanges.

Nor is it material that the interests *taken* by the several parties to an exchange are subject to different modifications. Thus joint-tenants exchanging lands with a sole owner, may be made tenants in common of the lands limited to them. Shepp. Touchst. 296.

Interests taken by the several parties.

3*rdly*, In order to give an instrument the operation of an exchange, the word "exchange" must be used. Co. Litt. 51. a. Thus, if A. by deed grant Whiteacre to B. in fee, and, in consideration thereof, B. by the same deed grant Blackacre to A. in the same manner, this will not enure as an exchange; Shepp. Touchst. 294; and consequently, if the subject be one that will not pass without livery of seisin, (which is not necessary to give effect to an *exchange*), it is void.

Word "exchange" must be used.

4*thly*, Entry is also requisite to give effect to an exchange; and therefore, if either party die before entry, his heir may avoid the exchange. Co. Litt. 51. b.; Perk. Sect. 284; Shepp. Touchst. 296.

Entry.

5*thly*, An exchange, since the statute of frauds, 29 Car. 2, c. 3, must, if it relate to land for a larger interest than a term of three years, be in writing, and if the things whereof the exchange is made lie in grant, i. e. if they consist of reversions, rents, or other incorporeal hereditaments, or if they lie in several counties, it must be by *deed*. Co. Litt. 51. b.

Writing and deed.

It will be obvious from what has been said of the nature of an exchange, that it can only take place between two sets of parties. Thus, where A. conveys lands to B., B. to C., and C. to A., this is not an exchange. Provost of *Eton* v. Bishop of *Winchester*, 3 Wils. 491.

Two sets of parties only.

That which constitutes at once the distinguishing feature, and the inconvenience of this mode of assurance, is the implied mutual warranty and right of re-entry, which are incident to exchanges; by the effect of which right of re-entry either party, in case of eviction, is entitled to enter upon the lands given in exchange for those from which he has been evicted, (though it be of part, or for a particular estate only, *Bustard's case*, 4 Rep. 121, *S. C. nom. Bustard* v. *Coulter*, Cro. El. 902, 917), and avoid the whole exchange, or he may recover an equivalent portion of his own lands under the warranty. Shepp. Touchst. 290. Thus, where A. grants Whiteacre to B. and his heirs, in exchange for Blackacre granted to A. and his heirs; if B., or his heirs, be evicted from Whiteacre at any

Right of re-entry in case of eviction from lands taken in exchange.

EXCHANGES AT COMMON LAW.

period, however remote, they may recover Blackacre against A. or his heirs, or *assigns;* but the benefit of this implied warranty and right of re-entry is confined to the parties themselves and their heirs, and does not extend to alienees. If, therefore, either party alien, either by deed or will, the remedy is gone from that party; but only as to him, for the other party who has not aliened, or his heirs, may still, in case of eviction from *his* lands, enter upon the alienee, notwithstanding the want of a reciprocal remedy. This right of entry on eviction, though reasonable in itself, is attended with inconveniences far outweighing the advantage to be derived from it, since it imposes upon both parties to the exchange the necessity of establishing the title, not only of the lands respectively taken, but of the lands respectively given by them in exchange, or to shew that the latter have been aliened in fee, which is frequently difficult of proof, (the title-deeds being of course in the custody of the other parties). This objection, however, applies with much less force in the Register Counties, *viz.* Middlesex and Yorkshire, where the fact of alienation can easily be ascertained and shewn.

The reader will perceive that the preceding observations relate to exchanges at common law, as distinguished from mutual conveyances, which have none of the peculiar properties of this assurance, though such transactions are, in ordinary language, denominated exchanges.

Mutual conveyances not exchanges.

Where it is the intention of the parties simply to make mutual conveyances without the incidents of an exchange, care should be taken to avoid using the word "exchange" in any part of the instrument. Even where those incidents are intended to be preserved, it is usual to effect the exchange by means of lease and release, in order to avoid the necessity of proving entry; and in this case, as the *release* operates at common law to enlarge the estate created under the statute of uses by the bargain and sale for a year, the mutual warranty incidental to exchanges arises, without raising the question, which has been thought to admit of doubt, whether such warranty can result from instruments deriving their effect from the statute of uses. The warranty may of course be negatived by express stipulation. See clause *infra*, p. 93.

Many gentlemen are in the habit, as well in proper deeds of exchange as in mutual conveyances, not operating as such, of giving a right of re-entry in case of eviction. (*Vide infra*, p. 91, 109). Sir E. B. Sugden has suggested that, in the case of exchanges, this clause is inoperative, being included in the implied warranty. (Sugd. Gilb. on Uses, 179, n. See also 1 Prest. Abst. 161). But it is to be observed that such clauses generally extend to the parties, their heirs, *and assigns*, while the implied warranty is, we have seen, confined to privies. There is strong ground, however, to contend that the clauses in question are void, as tending to restrict the absolute ownership for an indefinite period. They are invariably inserted in acts of Parliament passed to enable parties labouring under disabilities to exchange lands.

EXCHANGES AT COMMON LAW.

For further information on the subject of exchanges, the reader may consult the title "Exchange," in the Abridgments of Viner and Bacon, and Prest. Sheppard's Touchst. 289.

Exchanges under inclosure acts.

It may be observed (for the point is not always attended to in practice), that, under inclosure acts, the allotments taken in exchange are impressed with the title of the property given in lieu of them. The effect is simply that of substitution, and of course the parties taking under the act have only to deduce the title to their own lands.

DEED OF EXCHANGE AT COMMON LAW.

DEED *of* EXCHANGE *between the Mayor, Bailiffs, Burgesses, and Commonalty of the Town of* [P.], *and* [*A. B.*], *of certain Hereditaments in Fee, with mutual Powers of Re-entry in Case of Eviction.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN the mayor, bailiffs, burgesses, and commonalty of the town of [P.], of the one part; and [A. B.], of &c., of the other part: WITNESSETH, that in consideration of the gift, grant, and confirmation hereinafter mentioned to be made by the said [A. B.] to the said mayor, bailiffs, burgesses, and commonalty, and their successors; and for other good causes and valuable considerations, them the said mayor, &c. hereunto moving, *They*, the said mayor, &c. *have* given, granted, and confirmed, *And* by these presents *do*, give, grant, and confirm unto the said [A. B.], his heirs and assigns, (IN EXCHANGE for the messuage, tenement, or cellar, and hereditaments, hereinafter mentioned to be given, &c. by the said [A. B.] unto them the said mayor, &c. and their successors). ALL THAT the ground, land, or soil, situate by, and being in or near the town or harbour of [P.] aforesaid, over which the sea generally flows at its fullest tides, extending on the north-east and west to the old inclosure, where and as the same is now staked out for embankment; the extreme eastern point thereof to be the easternmost point towards the south of [H.] close, and the extreme western point there-

Parties.

Testatum.

Grant by a corporation in exchange for a house, &c.

Parcels.

DEED OF EXCHANGE AT COMMON LAW.

of, to be the westernmost point towards the south of [B.] close, and to extend and project in a curve line, from the said westernmost point to the said easternmost point, as and where the same is now staked out for embankment; which said ground, land, and soil is more particularly delineated or described in the plan or ground plot thereof hereunto annexed, and distinguished by a green colour; TOGETHER with all ways, paths, passages, easements, commons, rights, liberties, advantages, emoluments, hereditaments, and appurtenances whatsoever, to the said ground, land, soil, hereditaments, and premises so given, granted, and confirmed by the said mayor, bailiffs, burgesses, and commonalty as aforesaid, and every or any part thereof belonging or in anywise appertaining: AND the reversion and reversions, &c. AND ALL the estate, right, title, &c.

Habendum in fee.

TO HAVE AND TO HOLD the said ground, soil, and hereditaments, and all and singular other the premises hereinbefore mentioned to be given, granted, and confirmed by the said mayor, &c., with their and every of their appurtenances, unto the said [A. B.], his heirs and assigns, To AND FOR THE ONLY PROPER USE AND BEHOOF of the said [A. B.], his heirs and assigns, for ever. AND THE SAID mayor, &c., for themselves and their successors, *do* covenant, promise, and agree with and to the said [A. B.], his heirs, and assigns, by these presents, That if the said [A. B.], his heirs, and assigns, shall at any time hereafter apply for a licence from the crown, or for an act of Parliament, for a grant or confirmation to him the said [A. B.], his heirs or assigns, of the said ground, land, soil, hereditaments, and premises hereinbefore mentioned to be given, granted, and confirmed by the said mayor, &c. unto the said [A. B.], his heirs and assigns, as aforesaid, or any part thereof, *Then* and in such case they the said mayor, &c. shall and will, upon the request, and at the proper costs and charges of the said [A. B.], his heirs, executors, administrators, or assigns, join and concur with the said [A. B.], his heirs or assigns, in such application, and testify their consent thereto; and do all such other reasonable acts and deeds for facilitating and promoting the success of such application, and assisting the said [A. B.], his heirs and assigns, therein; *As* by the said [A.

Covenant to concur in applying for grant from the crown, &c.

DEED OF EXCHANGE AT COMMON LAW.

B.], his heirs or assigns, or his or their counsel in the law, shall be reasonably devised, or advised, and required. And *it is hereby agreed and declared* between and by the said parties hereto, and the true intent and meaning of them, and of these presents, is hereby declared to be, *That* if the said [A. B.], his heirs or assigns, or any person or persons lawfully claiming, or to claim, by, from, or under him, them, or any of them, shall at any time hereafter (without his or their wilful neglect or default), be evicted, or turned out of the possession of the said ground, land, or soil, hereditaments, and premises, hereinbefore mentioned to be given, &c. by the said mayor, &c. unto the said [A. B.], his heirs and assigns, or any part thereof, by any person or persons lawfully or equitably having or claiming, or to have or claim, any estate, right, title, or interest, in, to, or out of the same premises, so as that the said [A. B.], his heirs or assigns, or any person or persons lawfully claiming, or to claim, by, from, or under him, them, or any of them, shall or may be prevented or hindered from holding or enjoying the same, according to the true intent and meaning of these presents, *Then* and in such case these presents, and the gift, grant, and confirmation hereby made to the said [A. B.], his heirs and assigns, shall cease, determine, and be utterly void, and of no effect: And that it shall and may, in such case, be lawful to and for the said [A. B.], his heirs or assigns, or any other person or persons lawfully claiming, or to claim, by, from, or under him, them, or any of them, into and upon the said messuage, tenement, or cellar, hereditaments, and premises, hereinafter mentioned to be given, granted, and confirmed by him the said [A. B.] unto the said mayor, &c. and their successors (except the fee farm rent, or free rents, hereinafter also mentioned), to enter, and to have, hold, and enjoy the same; And to have, receive, and take the rents, issues, and profits thereof; And also to have, receive, take, hold, and enjoy the said fee farm rent, or free rents, to and for his and their own use or uses, in such and the same manner, to all intents and purposes whatsoever, as he or they might or could have done if these presents had not been made or executed; any thing herein contained to the contrary

Exchange to be void in case of eviction of [A. B.], his heirs or assigns, from lands taken in exchange.

And power of re-entry.

DEED OF EXCHANGE AT COMMON LAW.

Testatum.

notwithstanding. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the gift, grant, and confirmation hereinbefore mentioned to be made by the said mayor, bailiffs, &c., to the said [A. B.], his heirs, and assigns, as aforesaid, *And* for other good causes and valuable considerations him the said [A. B.] hereunto moving, *He*, the said [A. B.], *hath* given, granted, and confirmed, *And* by these presents *doth* give, grant, and confirm unto the said mayor, &c., and their successors for ever. (IN EXCHANGE for the ground, land, soil, and hereditaments hereinbefore mentioned to be given, &c., by the said mayor, &c., unto him the said [A. B.], his heirs and assigns, as aforesaid). ALL &c., [*parcels*]: AND ALSO ALL THOSE fee-farm or free rents, amounting in the whole to the sum of —— pounds yearly, out of certain lands in the said town and county of [P.], and usually paid by the inhabitants thereof to the said [A. B.], as lord of the manor of [C.] aforesaid: AND ALSO free liberty, from time to time, and at all times for ever hereafter, of resting in and upon the wall of the cellar of the said [A. B.] adjoining, &c. TOGETHER with free liberty, from time to time, and at all times for ever hereafter, of digging, taking, and carrying away sand, gravel, and marle, in, upon, and out of the waste grounds and commons of the manor of [C.] aforesaid, to and for their own use, and the use of the inhabitants of the said town and county of [P.], which now are or hereafter shall be, for the time being, to be made use of in the same town and county only, and not otherwise or elsewhere. TOGETHER with all ways, paths, &c., hereditaments, and appurtenances whatsoever, to the said messuage, tenement, cellar, fee-farm rent or free rents, hereditaments, and premises hereinbefore mentioned to be given, &c., by the said [A. B.] as aforesaid, and every or any part or parcel thereof, belonging or in anywise appertaining: AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the said messuage, or tenement, cellar, fee-farm rent, free rents, hereditaments, and premises hereby given, &c., by the said [A. B.], and every part and parcel thereof: AND all the estate, right, title, &c. TO HAVE AND TO HOLD the said

Grant by A. B. in exchange.

Parcels.

Habendum in fee.

DEED OF EXCHANGE AT COMMON LAW.

messuage, &c., and all and singular other the premises hereinbefore mentioned to be given, &c., by the said [A. B.], with their and every of their appurtenances, unto the said mayor, &c., and their successors, TO AND FOR THE ONLY PROPER USE AND BEHOOF of the said mayor, &c., and their successors for ever. AND it is hereby agreed, &c., *(the same,* mutatis mutandis, *as from page* 91, *line* 3, *to page* 92, *line* 1, *omitting the clause relating to the rents).* IN WITNESS, &c. (*a*).

(*a*) Where it is intended to negative the implied warranty and right of re-entry, which are incidental to an exchange, the following clause should be substituted for the powers of entry contained in the precedent above given.

Declaration negativing the implied warranty and right of re-entry.

AND *it is hereby declared and agreed* by and between the said parties to these presents, that the implied mutual warranty and right of re-entry, incident to an exchange at common law, shall not attach or belong to the exchange hereby made; and that such exchange shall not be in anywise avoided, defeated, or disturbed in consequence of the eviction, by title paramount or otherwise, of either of the parties hereto, or any person or persons claiming under them, or either of them respectively, from the hereditaments and premises hereby given, granted, and confirmed to him or them respectively; nor shall the title of either of the said parties, or of any person or persons claiming under him or them respectively, to the hereditaments and premises hereby given, granted, and confirmed to him or them respectively, depend upon the title of the other of the said parties, or his or their heirs respectively, to the hereditaments and premises hereby given, granted, and confirmed to such other of the same parties respectively†.

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† Considering the acknowledged inconvenience that results from the implied warranty and right of re-entry, incident to exchanges, it is extraordinary that parties should not only not negative this result in the manner suggested in the text, but attempt to carry it further, by extending the right of entry to the alienee of the parties, as well in exchanges as in mutual conveyances. If there be any force, however, in the observation before made in regard to such clauses, they are absolutely void.

BY APPOINTMENT AND RELEASE.

APPOINTMENT *and Release (in Consideration of a mutual Conveyance by way of Exchange), to H. B. and his Heirs, in Trust for C. B. and his Heirs* (*a*).

THIS INDENTURE, made the —— day of ——, 18—; Parties. BETWEEN [T. L.], of &c., of the first part; [H. B.], of &c., of the second part; and [E. B.], of &c., of the third part. Recital that, by lease and release, WHEREAS, by indentures of lease and release, bearing date respectively on or about the second and third days of December, 1816, the release being expressed to be made between the [Rev. R. D.], of &c., of the first part; [M. W.], of &c., of the second part; the said [T. L.], of the third part; and [R. L.], of &c., of the fourth part, *The* cottage or tenement, lands, and other hereditaments, hereinafter described, and hereby appointed and released, or intended so to be, with a cottage, &c. were conveyed.

Whether an appointment can operate as an exchange.

(*a*) Though it is not necessary that both parties to the exchange should come to the thing given "by the same means and manner of assurance," and therefore, if lessee for life of one acre give another acre to his lessor in tail, in exchange for a release from him of that acre, to hold in tail in like manner, this is a good exchange: Shepp. Touchst. 295: yet it is apprehended that where the instrument operates in respect of the lands conveyed by either party as an *appointment*, this is not an exchange, properly so called, that is, carrying the mutual implied warranty; for even admitting that an instrument operating under the statute of uses can have effect as an exchange, (which has been questioned), yet, as in the present instance, the appointee is *in* immediately under the instrument creating the power, and not under the deed by which it is exercised, there is a want of that mutuality between him and the other party, which is of the essence of an exchange. The three subsequent precedents in the text, it willbe seen, are of this nature.

It will be obvious too, for the reason suggested, that conveyances, made under the ordinary powers to make exchanges contained in settlements, and which necessarily take effect as appointments, operate as mutual conveyances only, and not as exchanges at common law.

BY APPOINTMENT AND RELEASE.

the appurtenances, were, with other hereditaments, conveyed and assured, (*Subject*, in equity, to the estates, which, by the will of [H. D.], late of &c., widow, bearing date the third day of October, 1810, and proved in the Prerogative Court of the Archbishop of Canterbury, on the 24th day of January, 1814, were devised to the children of the said [R. D.], in case the same should be subsisting, after the execution of the indentures of lease and release now in recital, the trustee, to whom the said hereditaments were, by the said will of the said [H. D.], devised or limited during the life of the said [R. D.], *Upon trust* to preserve the said estates, having died in the lifetime of the said testatrix, and the said [R. D.] not having then or since had any issue), *To the use* of such person or persons, &c. (*Uses to prevent dower, ut ante*, Vol. I. p. 652). And whereas, by indenture bearing date on or about the 22nd day of July, in the year 1818, and expressed to be made between [M. B.], of &c., and [J. A.], of &c., and the said [E. B.], of the first part; [J. M. B.], of &c., and [T.] his wife, of the second part; the said [E. B.], of the third part; and the said [H. B.], of the fourth part; *The* pieces or parcels of lands and hereditaments, hereinafter secondly described, or mentioned, with the appurtenances, were thereby conveyed and assured unto and *To the use* of the said [H. B.] and his heirs, *In trust* for the said [E. B.], and his heirs for ever. And whereas it hath been agreed by and between the said [T. L.] and [H. B.], with the consent of the said [E. B.], that the said [T. L.] shall convey and assure the cottage or tenement, lands, and hereditaments hereinafter first described, and hereby released, or intended so to be, unto and to the use of the said [H. B.] and his heirs, upon trust for the said [E. B.] and his heirs, and in exchange for the pieces or parcels of land and hereditaments hereinafter secondly described, and of which he the said [H. B.] is so seised, upon trust as aforesaid. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in consideration, that, by the indentures of lease and release, bearing date, respectively, the day next before, and even date with these presents, the release being expressed to be

(Subject, in equity, to estates limited to unborn children, the trustee to preserve the contingent remainders of which estates died in the lifetime of the testatrix).

To uses to prevent dower.

Recital of conveyance.

Of parcels to be given in exchange.

Recital of agreement for exchange.

Testatum.

Consideration, conveyance of other lands to conveying party.

BY APPOINTMENT AND RELEASE.

made between the said [H. B.], of the first part; the said [E. B.], of the second part; the said [T. L.], of the third part; and [A. B.], of &c., of the fourth part; *they*, the said [H. B.] and [E. B.] *have* respectively granted and conveyed *The* pieces or parcels of land and hereditaments, hereinafter secondly described, unto or to uses, for the benefit of the said [T. L.], his heirs and assigns; *And also* in consideration of ten shillings of lawful money of Great Britain, to the said [T. L.] paid by the said [H. B.] immediately before the execution of these presents, the receipt whereof is hereby acknowledged, *He* the said [T. L.], pursuant to, and by force and virtue, and in exercise and execution of the power and authority given, limited, or reserved to him, in and by the said hereinbefore in part recited indenture of release, of the 3rd day of December, 1816, and of every other power and authority whatsoever, in anywise enabling him, in this behalf, and at the request, and by the direction of the said [E. B.], testified by his executing these presents, *hath* directed, limited, and appointed, *And* also granted, bargained, sold, aliened, released, and confirmed; *And* by this present deed, sealed and delivered by him in the presence of the two credible persons whose names are intended to be hereupon indorsed, *Doth* absolutely and irrevocably direct, limit, and appoint; *And* also grant, bargain, sell, alien, release, and confirm unto the said [H. B.], and his heirs, (in the actual possession, &c. *ut ante*, Vol. III. p. 497), ALL THAT cottage or tenement, &c., And all out-houses, &c. reversion, &c. estate, &c. (*ut ante*, Vol. III. p. 498), TO HAVE AND TO HOLD the said cottage or tenement, &c. hereby appointed and released, or intended so to be, with their and every of their appurtenances, unto the said [H. B.], his heirs and assigns, TO THE USE of the said [H. B.], and his heirs and assigns, for ever; *But nevertheless*, UPON TRUST for him, the said [E. B.], his heirs and assigns, for ever; [IN LIEU OF, AND IN EXCHANGE FOR *All*, &c. (being the lands and hereditaments which are hereinbefore mentioned to have been conveyed, or otherwise assured by the said [H. B.] and [E. B.] unto the said [T. L.], his heirs and assigns, by the said indentures of lease and release, bearing date respectively the day next before and

Nominal consideration.

Appointment and release.

Parcels.

Habendum in fee.

In exchange for the other lands.

even date with these presents (*a*)]; And the said [T. L.] for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the said [H. B.], his heirs and assigns, and also separately with the said [E. B.], his heirs and assigns, in manner following, *viz. (for peaceable enjoyment, &c. against [T. L.], his heirs and assigns, and all persons claiming by, from, through, under, or in trust for him or the said [H. D.], deceased:) And* that free and clear, and freely and clearly acquitted, exonerated, released, and discharged, or otherwise, by him the said [T. L.], his heirs, executors, or administrators, well and sufficiently protected, saved harmless, and kept indemnified, against the estates, by the will of the said [H. D.], devised to the child and children of the said [R. D.]: *And also* of, from, and against all and all manner of adverse estates, titles, &c. made, done, committed, or suffered by the said [T. L.], or any person, &c. *(And for further assurance)*: In witness, &c.

BY APPOINTMENT AND RELEASE.

Covenants for title, &c.

(*a*) As this clause is inefficacious in the present instance to raise the incidents of an exchange, it may be properly omitted.

APPOINTMENT *and* RELEASE *by way of* EXCHANGE *of Lands by Trustees under a Power of Sale and Exchange, (with the Consent of the Tenant for Life and his Wife);* Release *in Fee to two Tenants for Life, and the Remainder-man in Fee, to whom Money is paid for Equality of Exchange by the latter; with mutual Powers of Re-entry in case of Eviction.*

BY TRUSTEES UNDER A POWER, WITH TENANTS FOR LIFE, AND REMAINDER-MAN.

THIS INDENTURE, made the —— day of ——, 18—; Between [J. S.], of &c., and [C. L.], of &c., of the first part; [C. H. T.], of &c., and The Honourable [H. S. T.], his wife, of the second part; The Right Honourable [H. C. T.], dowager Lady Viscountess [H.], of

Parties.

BY TRUSTEES UNDER A POWER, WITH TENANTS FOR LIFE, AND REMAINDER-MAN.

the third part; The Right Honourable [S.], Lady [E], widow of The Honourable [F. C.], commonly called Lord [E.], deceased, of the fourth part; The Right Honourable [F. C.], Earl of [W.], only son and heir apparent of the said [S.], Lady [E.], of the fifth part; and [C. D.], of the sixth part. WHEREAS, by indentures of lease and release, bearing date respectively on or about the twenty-eighth and twenty-ninth days of December, 1798; the release being made between the said [C. H. T.], of the first part; the said [H. S. T.], of the second part; the said [J. S.] and [C. L.], of the third part; [J. P.], esquire, and [J. V.], the younger, esquire, therein respectively described, of the fourth part; [R. P.], esquire, and [C. S.], esquire, therein respectively described, of the fifth part; and [W. S.], esquire, and the Reverend [E. L. C.], therein also respectively described, of the sixth part; (being the settlement made previously to, and in consideration of, the marriage then intended, and since solemnized between the said [C. H. T.] and [H. S. T.]); the manor, and other hereditaments therein described, and amongst which are included the lands and hereditaments hereinafter firstly described, with their and every of their rights, members, and appurtenances, were limited, conveyed, and assured, to such uses, trusts, intents, and purposes, and under and subject to such provisoes, declarations, and agreements, to take effect and arise after the solemnization of the said then intended marriage, as in and by the said indenture of release are limited and contained, and in part hereinafter mentioned; that is to say—*To the use* of the said [J. P.] and [J. V.], their executors, administrators, and assigns, for the term of one hundred years, without impeachment of waste; *Upon* such trusts, as by the said indenture of release are thereof declared, for securing the annual sum of one thousand pounds, for the separate use of the said [H. S. T.]; And, subject to the said term of one hundred years, *To the use* of the said [C. H. T.], and his assigns, during his life, with remainder *To the use* of the said [J. S.] and [C. L.], their heirs and assigns, during the life of the said [C. H. T.], *Upon trust*, to preserve the contingent uses and estates thereinafter limited from being defeated; with remainder *To the use* of the said [R.

Recital of settlement on marriage of [C. H. T.] with [H. S. T.],

whereby manors, &c. were conveyed,

To the use of trustees for 100 years,

upon trust for securing 1000*l.* a-year for the separate use of wife;

and, subject thereto,

To the use of husband and his assigns for life,

remainder—To the use of trustees, to preserve contingent remainders;

BY TRUSTEES UNDER A POWER, WITH TENANTS FOR LIFE, AND REMAINDER-MAN.

P.] and [C. S.], their executors, administrators, and assigns, during the term of two hundred years, to commence and be computed from the day of the decease of the said [C. H. T.], without impeachment of waste, *Upon the trusts*, nevertheless, thereinafter declared concerning the same; And, subject to the said term of two hundred years, and to the trusts thereof, *To the use* of the said [W. S.] and [E. L. C.], their executors, administrators, and assigns, for the term of five hundred years, to commence also and be computed from the day of the decease of the said [C. H. T.], without impeachment of waste, *Upon the trusts* thereinafter mentioned concerning the same, with remainder *To the use* of the said [H. S. T.] and her assigns, during her life, without impeachment of waste, with remainder *To the use* of the said [J. S.] and [C. L.], their heirs, and assigns, during the life of the said [H. S. T.], *Upon trust* to preserve the contingent remainders thereinafter limited from being defeated; with divers remainders over. In which said indenture of release a power is contained, enabling the said [J. S.] and [C. L.], and the survivor of them, and the executors or administrators of such survivor, at any time or times thereafter, (at the request, and by the direction of the said [C. H. T.] and [H. S. T.], during their joint lives, to be testified by some writing or writings under their respective hands and seals), to dispose of, and convey, either by way of absolute sale, or in exchange for, or in lieu of other manors, messuages, lands, tenements, or hereditaments, to be situate in England or Wales, all or any part or parts of the manors, messuages, lands, tenements, hereditaments, and premises, thereinbefore respectively granted and released, and the inheritance thereof, in fee simple, unto any person or persons whomsoever, for such price or prices in money, or for such equivalent in manors, messuages, lands, tenements, or hereditaments, as to them the said [J. S.] and [C. L.], or the survivor of them, or the executors or administrators of such survivor, should seem reasonable. *And* for the purpose of effecting such sales, exchanges, dispositions, and conveyances, *It is declared* by the said indenture of release, that it should be lawful for the said [J. S.] and [C. L.], and the survivor of them, and the executors or administrators of such survivor, (at such request,

remainder—To the use of trustees for 200 years;

remainder—To the use of trustees for 500 years,

remainder—To the use of wife for life,

remainder—To the use of trustees to preserve contingent remainders,

with remainders over,

Power of sale and exchange.

BY TRUSTEES UNDER a POWER, WITH TENANTS FOR LIFE, AND REMAINDER-MAN.

by such direction, and so testified as aforesaid), by any deed or deeds, instrument or instruments in writing, sealed and delivered by them, or him, in the presence of, and attested by two or more credible witnesses, absolutely to revoke, determine, and make void all and every, or any of the uses, trusts, powers, and provisoes thereinbefore limited, expressed, and declared of and concerning the hereditaments and premises which should be so agreed to be sold or exchanged, or any part thereof; and by the same or any other deed or deeds, instrument or instruments, in writing, to limit, declare, direct, and appoint, any use or uses, estate or estates, trust or trusts, of the said hereditaments and premises, the uses and trusts of which should be so revoked, which it should be thought necessary or expedient to limit, declare, direct, or appoint, in order to effectuate any such sale, exchange, disposition, or conveyance as aforesaid; *And also*, that upon any or every such exchange as aforesaid, it should be lawful for the said [J. S.] and [C. L.], and the survivor of them, and the executors or administrators of such survivor, to receive or take any sum or sums of money by way of equality of exchange; *And also*, that upon payment of the money to arise by any sale or sales of the said hereditaments and premises, or any part thereof, or of any money to be paid for equality of exchange, or any part thereof, it should be lawful for the said [J. S.] and [C. E.], and the survivor of them, and the executors or administrators of such survivor, to sign and give receipts for the money for which the same should be so sold, or so to be paid for equality of exchange, as aforesaid; *And* that such receipts should be good and sufficient discharges to the person or persons paying the same respectively, for the money for which the same should be so given, or for so much thereof as in such receipt or receipts should be acknowledged to be received; *And* that the person or persons paying the same respectively, and taking such receipt or receipts for the same respectively, his, her, or their heirs, executors, administrators, or assigns, should not afterwards be answerable or accountable for any loss, misapplication, or non-application of the said monies, or be in anywise obliged to see to the application thereof, or of any part thereof respective-

BY TRUSTEES UNDER A POWER, WITH TENANTS FOR LIFE, AND REMAINDER-MAN.

ly; *And* it was by the said indenture of release also declared, that the said [J. S.] and [C. L.], or the survivor of them, or the heirs, executors, or administrators of such survivor, should settle and assure, or cause to be settled and assured, as well the manors, messuages, lands, tenements, and hereditaments which should be purchased, as therein directed, by the monies to arise by such sale or sales as aforesaid, as also all such manors, messuages, lands, tenements, and hereditaments which should be received in exchange, as therein and hereinbefore mentioned, *To* such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisoes, declarations, and agreements as are in and by the said indenture of release limited, expressed, declared, and contained of and concerning the hereditaments and premises which should be so sold or conveyed in exchange as aforesaid, or such of them as, at or immediately before the time of such sale or exchange, should be subsisting, undetermined, and capable of taking effect, or as near thereto as the deaths of persons, or other intervening accident, would admit of. AND WHEREAS, under and by virtue of indentures of lease and release, bearing date respectively the —— and —— days of ——, 1809, the release being made between [F.] Earl of [M.], [W. F.], [W. B.], and [C. T.], therein respectively described, of the first part; the said [H. C.] Viscountess [H.], of the second part; the said [S.] Lady [E.], of the third part; the said [F.] Earl of [W.], of the fourth part; [R. E.], of &c., of the fifth part; and [G. E.], of the same place, gentleman, of the sixth part; *And* by virtue of a common recovery, duly suffered in or as of —— Term, 1809, in pursuance of an agreement for that purpose contained in the said indenture of release, in which recovery the said [F.] Earl of [W.] was vouched, certain manors and other hereditaments therein mentioned, (among which are included the hereditaments hereinafter secondly described and expressed to be hereby granted and released,) were conveyed or assured, and now stand limited, *To the use* of the said [H. C.] Viscountess [H.], and her assigns, during the term of her natural life, with remain-

Recital that, by lease and release for making a tenant to the *præcipe* for suffering a common recovery, of (*inter alia*) the lands secondly described,

the same lands were conveyed

To the use of [H. C.] Viscountess [H.], for life,

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der, *To the use* of the said [S.] Lady [E.], and her assigns, during the term of her natural life, with remainder, *To the use* of the said [F.] Earl of [W.], his heirs and assigns, for ever. And whereas the said [J. S.] and [C. L.], at the request and by the direction of the said [C. H. T.], and [H. S. T.], his wife, (testified as hereinafter is mentioned), have agreed with the said [H. C.] Viscountess [H.], [S.] Lady [E.], and [F.] Earl of [W.], to convey to the use of them, in manner hereinafter mentioned, the hereditaments hereinafter firstly described, with the appurtenances, (being part of the hereditaments comprised in the said indentures of lease and release, of the twenty-eighth and twenty-ninth days of December, 1698), in exchange for, or in lieu of, the hereditaments hereinafter secondly described, and expressed to be granted and released, with the appurtenances, (being part of the hereditaments comprised in the said indentures of lease and release), of the —— and —— days of ——, 1809: *But* inasmuch as the hereditaments firstly hereinafter described do not, upon the most accurate calculation, amount to the value of the hereditaments secondly hereinafter described, and expressed to be hereby granted and released, by the sum of £——, the said [C. H. T.] hath agreed, out of his own proper monies, to pay that sum to the said [H. C.] Viscountess [H.], [S.] Lady [E.], and [F.] Earl of [W.], by way of equality of exchange; *And* the said [C. H. T.] doth hereby testify and declare his intention, that the said sum of £—— so to be paid by him for equality of exchange, as aforesaid, shall not be considered as a charge in equity fer his benefit, upon the hereditaments secondly hereinafter described. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and for the purposes of effecting the said exchange, so agreed to be made as aforesaid, *And* in consideration of the grant, release, and assurance hereinafter made by the said [H. C.] Viscountess [H.], [S.] Lady [E.], and [F.] Earl of [W.], to the said [J. S.] and [C. L.], their heirs and assigns, of the hereditaments secondly hereinafter described, *They*, the said [J. S.] and [C. L.], at the request, and by the direction of the said [C. H. T.], and [H. S. T.], his wife, (tes-

remainder To the use of [S.] Lady [E.], for life, remainder To the use of [F.] Earl [W.], in fee.

Recital of agreement for exchange.

Money paid for equality of exchange.

Declaration by tenant for life, who advances money for equality of exchange, that the same shall not be considered as a charge in equity for his benefit.

Testatum.

Revocation of the uses of the first recited settlement.

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tified by this deed or writing, under their respective hands and seals), and pursuant to, and in execution of, the power or authority to them the said [J. S.] and [C. L.] given, limited, or reserved, in and by the said in part recited indenture of release, of the twenty-ninth day of December, 1798, and by force and virtue thereof, and of every other power and authority to them belonging, in them vested, or in anywise them enabling in this behalf, by this present deed or instrument in writing, by them the said [J. S.] and [C. L.] sealed and delivered in the presence of, and attested by, two credible witnesses, *Do* absolutely revoke, determine, and make void all and every the uses, trusts, powers, and provisoes, in and by the said indenture of release, of the twenty-ninth day of December, 1798, limited, expressed, and declared, of and concerning ALL THAT, &c. *(parcels)*. AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said recited agreement, and for the consideration hereinbefore expressed, and in pursuance and execution of the further power or authority to them the said [J. S.] and [C. L.] given, limited, or reserved in and by the said indenture of release, of the twenty-ninth day of December, 1798, as aforesaid, and by virtue thereof, and of every other power in them vested, *They*, the said [J. S.] and [C. L.], at the like request, and by the like direction, of the said [C. H. T.] and [H. S. T.], his wife, testified as aforesaid, by this present deed or instrument in writing, by them the said [J. S.] and [C. L.] sealed and delivered, and intended to be attested as aforesaid, *Do* limit, declare, direct, and appoint, that the said messuage or tenement, lands, hereditaments, and premises hereinbefore described, and of which the uses, trusts, powers, and provisoes, are hereinbefore revoked, determined, and made void, as aforesaid, with the appurtenances, shall henceforth remain, continue, and be; and that the said indenture of release of the twenty-ninth day of December, 1798, and the full force and effect thereof, shall henceforth, as for and concerning the said lastly mentioned lands, hereditaments, and premises, operate, be, and enure, *To the uses* hereinafter limited and declared of and concerning the same, *In exchange* for the lands and hereditaments, with

Second Testatum.

Appointment of the lands, the uses whereof are revoked.

Appointment.

To the uses hereinafter declared, in exchange for the lands here-

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inafter described.

Third testatum.

the appurtenances hereinafter described, and intended to be hereinafter conveyed and assured by them the said [H. C.] Viscountess [H.], [S.] Lady [E.], and [F.] Earl of [W.], unto the said [J. S.] and [C. L.], their heirs and assigns, as hereinafter mentioned. AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said recited agreement, and in consideration of the premises, and for rendering more effectual the exchange so agreed to be made as aforesaid; and also in consideration of the sum of five shillings, of lawful money of Great Britain, to them the said [J. S.], and [C. L.], [C. H. T.] and [H. S. T.] his wife, in hand paid, by the said [C. D.], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, *They* the said [J. S.] and [C. L.], at the like request, and by the like direction, of the said [C. H. T.] and [H. S. T.] his wife, testified as aforesaid; and also at the request, and by the direction of the said [H. C.] Viscountess [H.], [S.] Lady [E.], and [F.] Earl of [W.], (testified in manner aforesaid), and according to their respective estates, rights, and interests, *Have*, and each of them *Hath* bargained, sold, and released; *And* by these presents *Do*, and each of them *Doth* bargain, sell, and release; *And* the said [C. H. T.] and [H. S. T.] his wife, *Have*, and each of them *Hath* granted, bargained, sold, released, and confirmed; *And* by these presents *Do*, and each of them *Doth* grant, bargain, sell, release, and confirm unto the said [C. D.], (in his actual possession, &c.), and to his heirs and assigns, THE said messuage or tenement, lands, hereditaments, and premises, hereinbefore described, and of which the uses, trusts, powers, and provisoes, are hereinbefore revoked, determined, and made void, as aforesaid, with their and every of their rights, members, and appurtenances: AND the reversion, &c. AND all the estate, &c. *And* true and attested copies of the deeds mentioned in the schedule intitled the First Schedule. TO HAVE AND TO HOLD the said messuage or tenement, lands, hereditaments, and premises, hereinbefore mentioned, and expressed to be hereby granted and released, with their and every of their rights, members, and appurtenances, unto the said [C. D.], his heirs and

Release by trustees and tenants for life.

Parcels.

And the reversion, &c., all the estate, &c.

Habendum.

assigns for ever, IN EXCHANGE, as aforesaid, for the lands and hereditaments by them the said [H. C.] Viscountess [H.], [S.] Lady [E.], and [F.] Earl of [W.], intended to be hereby conveyed and assured unto the said [J. S.] and [C. L.], their heirs and assigns, as hereinafter mentioned; *But, nevertheless,* TO THE USES following, that is to say, TO THE USE of the said [H. C.] Viscountess [H.], and her assigns, during the term of her natural life; *And,* after her decease, TO THE USE of the said [S.] Lady [E.], and her assigns, during the term of her natural life; *And,* after the several deceases of the said [H. C.] Viscountess [H.], and [S.] Lady [E.], and in the meantime subject to the uses or estates hereinbefore limited to them respectively, during their respective lives, as aforesaid, TO THE USE of the said [F.] Earl of [W.], his heirs and assigns, for ever. AND each of them the said [J. S.] and [C. L.] doth hereby for himself, his heirs, executors, and administrators, and so far only as concerns his own acts and deeds, covenant and declare with and to the said [C. D.] and his heirs, That they the said [J. S.] and [C. L.] respectively have not at any time heretofore made, done, executed, committed, or suffered, any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof, the messuage or tenement, lands, hereditaments, and premises hereinbefore appointed and released, or expressed and intended so to be, as aforesaid, or any of them, or any part thereof, are, is, can, shall, or may be conveyed, assured, impeached, charged, or in any wise incumbered; or whereby, or by reason or means whereof, the powers or authorities to them limited or reserved, in and by the said indenture of release, of the twenty-ninth day of December, 1798, or either of such powers or authorities, so far as the same respectively relate to or concern the same messuage or tenement, lands, hereditaments, and premises, have or hath been exercised, released, extinguished; or in anywise suspended. AND THE SAID [C. H. T.] for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the said [C. D.] and his heirs, in manner following, that is to say, That (for and notwithstanding any act, matter, or thing whatsoever, by the said [C. H. T.]

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to C. D. in fee, in exchange for the other lands; But nevertheless to the use of [H. C.] Visc. [H.] for life; remainder, to the use of [S.] Lady [E.] for life; remainder to the use of [F.] Earl of [W.] in fee.

Covenant by trustees, that they have not incumbered,

or exercised the power of sale and exchange.

Covenant by tenant for life for title;

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and [H. S. T.] his wife, or either of them, or any of the ancestors of the said [H. S. T.], made, done, committed, or willingly or knowingly suffered to the contrary), They the said [J. S.], [C. L.], [C. H. T.], and [H. S. T.] his wife, or some or one of them, now at the time of the sealing and delivery of these presents, have or hath in themselves, himself, or herself, good right, full power, and lawful and absolute authority, to convey and assure the said messuage or tenement, lands, hereditaments, and premises, hereinbefore mentioned, and intended to be hereby conveyed and assured, and every part and parcel thereof, with their and every of their appurtenances, in manner aforesaid, and according to the true intent and meaning of these presents. AND LIKEWISE, that the said messuage or tenement, lands, hereditaments, and premises, hereinbefore appointed and released, or otherwise assured or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, shall and lawfully may from time to time, and at all times hereafter, remain, continue, and be, to the several uses hereinbefore limited and declared of and concerning the same; *And* shall and may be peaceably and quietly had, held, and enjoyed, and the rents and profits thereof received and taken accordingly, without the let, suit, trouble, denial, eviction, ejection, disturbance, molestation, hinderance, interruption, claim, or demand whatsoever, of, from, or by the said [C. H. T.] and [H. S. T.] his wife, or either of them, or any person or persons claiming, or to claim, by, from, through, under, or in trust for them, or either of them, or any of the ancestors of the said [H. S. T.] AND that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by him the said [C. H. T.], his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, right and title of dower, uses, trusts, wills, intails, statutes, recognizances, judgments, extents, executions, debts, legacies, annuities, sum and sums of money, estates, rights, titles, troubles, charges, liens, and incumbrances whatso-

for quiet enjoyment;

free from incumbrances;

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and for further assurance.

ever, had, made, done, committed, occasioned, or suffered by him the said [C. H. T.] and [H. S. T.] his wife, or either of them, or any of the ancestors of the said [H. S. T.]. AND MOREOVER, that the said [C. H. T.] and [H. S. T.] his wife, and each of them, and their respective heirs, and every other person having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or interest in, to, or out of the said messuage or tenement, lands, hereditaments, and premises, hereinbefore expressed to be hereby appointed and released, or any of them, or any part thereof, by, from, through, or under them or either of them, or by, from, through, or under any of the ancestors of the said [H. S. T.], shall and will from time to time, and at all times hereafter, upon every reasonable request of the said [C. D.] or his heirs, and at the expense of the person or persons for the time being beneficially interested in the premises, make, do, acknowledge, levy, suffer, and execute, or cause or procure to be made, done, acknowledged, levied, suffered, and executed, all such further and other lawful and reasonable acts, deeds, matters, things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely granting, releasing, and assuring the said messuage or tenement, lands, hereditaments, and premises, with their and every of their rights, members, and appurtenances, *To the uses* hereinbefore limited and declared of and concerning the same, or such of them as shall be then subsisting; *As* by the said [C. D.] or his heirs, or his or their or any of their counsel in the law, shall be reasonably devised, or advised, and required; *So* that such further assurance or assurances contain or imply no further or other warranty or covenant, than against the person or persons who shall be required to make and execute the same; *And so* that the person and persons who shall be required to make and execute such further assurance or assurances, be not compelled, or compellable, for the making or doing thereof, to go or travel from his, her, or their respective dwelling or dwellings, or usual place or places of residence or abode. AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said

Fourth testatum.

BY TRUSTEES UNDER A POWER, WITH TENANTS FOR LIFE, AND REMAINDER-MAN.

recited agreement, and in consideration of the appointment, release, and assurance hereinbefore contained, of the said hereinbefore described hereditaments and premises, and also in consideration of the sum of —— pounds of lawful money of Great Britain, to the said [H. C.] Viscountess [H.], [S.] Lady [E.], and [F.] Earl of [W.], by way of equality of exchange, in hand paid by the said [C. H. T.], at or before the sealing and delivery of these presents; The receipt of which said sum of —— pounds, the said [H. C.] Viscountess [H.], [S.] Lady [E.], and [F.] Earl of [W.], do hereby respectively acknowledge; and of and from the same, and every part thereof, do, and each and every of them doth acquit, release, and discharge the said [C. H. T.], his heirs, executors, administrators, and assigns, and every of them, for ever, by these presents: and in consideration of five shillings to the said [H. C.] Viscountess [H.], [S.] Lady [E.], and [F.] Earl of [W.], paid by the said [J. S.] and [C. L.], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged; *They*, the said [H. C.] Viscountess [H.], [S.] Lady [E.], and [F.] Earl of [W.], according to their respective rights, estates, and interests, *have*, and each and every of them *hath* granted, bargained, sold, released, and confirmed; *And* by these presents *do*, and each and every of them *doth* grant, bargain, sell, release, and confirm, unto the said [J. S.] and [C. L.], (in their actual possession, &c.), and to their heirs and assigns, ALL THAT &c. *(parcels)*, AND all houses, &c. AND the reversion, &c. AND all the estate, &c. AND true and attested copies of the deeds mentioned in the schedule intitled the Second Schedule, &c. TO HAVE AND TO HOLD the said lands, tenements, hereditaments, and all and singular other the premises hereby lastly granted and released, or expressed or intended so to be, with their and every of their rights, members, and appurtenances, unto the said [J. S.] and [C. L.], their heirs and assigns, for ever, IN EXCHANGE for the lands, hereditaments, and premises, firstly hereinbefore mentioned, and intended to be hereby conveyed and assured, as aforesaid; *But, nevertheless*, to such and the same uses, upon such and the same trusts, for such and the same in-

Release.

Parcels. General words, &c.

Habendum, to trustees in fee, in exchange for the first-mentioned lands.

But, nevertheless, To uses, &c.

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tents and purposes, and under and subject to such and the same powers, provisoes, declarations, and agreements, as in and by the said in part recited indenture of release, of the twenty-ninth day of December, 1798, are or were limited, declared, expressed, and contained of and concerning the hereditaments and premises hereinbefore firstly described, and intended to be hereby firstly conveyed, or to, for, upon, under, and subject to such of the same uses, trusts, intents and purposes, powers, provisoes, and agreements, as immediately before the execution of these presents were subsisting, undetermined, and capable of taking effect. *(Add covenants for the title; and from each party to produce title deeds to the other).* PROVIDED ALWAYS, *and it is hereby agreed and declared,* between and by the said parties hereto, that if any of the lands or hereditaments respectively hereinbefore appointed, released, or assured, or any of them, or any part or parts thereof respectively, shall, at any time or times hereafter, be lawfully evicted, or taken away out of the possession of the person or persons to whose use the same premises are hereinbefore limited, by any right or title precedent to the date and execution of these presents—*Then,* and thenceforth, it shall be lawful to and for all and every the person or persons, and his and their heirs or assigns, out of whose possession such premises shall be so lawfully evicted and taken away, from, and immediately after such eviction or taking away of the possession of the said premises respectively, or any of them, or any part thereof, as aforesaid, to enter into the lands and hereditaments hereby conveyed, in lieu of and in exchange for the said lands and hereditaments which shall be so lawfully taken away, and the same to have, hold, and enjoy again, as in his, her, or their first or former estate, any thing herein contained to the contrary notwithstanding. IN WITNESS, &c.

of the settlement of 1798.

Covenants.

Power of re-entry on the lands given in exchange, in case of eviction from the lands taken in exchange.

THE FIRST SCHEDULE, to which the above-written indenture refers.

THE SECOND SCHEDULE, to which the above-written indenture refers. *Vide ante,* Vol. I. p. *2.*

IN CONSIDERATION OF CONVEYANCE OF LANDS BY ANOTHER DEED.

RELEASE *of Lands by Trustee, by the Direction of* Cestui que Trust, *in Consideration that the Releasee, by another Deed, had conveyed other Lands to the Trustee upon a similar Trust, in Exchange for the Lands hereby conveyed; with a Power of Re-entry, in case of Eviction.*

THIS INDENTURE, made the —— day of ——, 18—;

Parties,

BETWEEN [H. B.], of &c., of the first part; [E. B.], of &c., of the second part; [T. L.], of &c., of the third part; and [A. B.], *(trustee to prevent dower)*, of &c., of the fourth part.

Recital of conveyance of lands to be conveyed in exchange.

WHEREAS, by indenture, bearing date on or about the twenty-second day of July, 1818, and expressed to be made between [M. B.], of &c., [J. A.], of &c., and the said [E. B.] of the first part; [J. M. B.], of &c., and [F.], his wife, of the second part; the said [E. B.], of the third part; and the said [H. B.], of the fourth part;—ALL, &c., *(parcels to be conveyed by* [H. B.]), were, with other hereditaments, duly conveyed and assured unto and to the use of the said [H. B.] and his heirs, *In trust* for the said [E. B.] and his heirs, for ever.

Recital of agreement for exchange.

AND WHEREAS it hath been agreed, by and between the said [H. B.] (with the consent of the said [E .B.]) and the said [T. L.], that the said [H. B.] shall convey and assure the pieces or parcels of land and hereditaments hereinbefore described, and hereby released or otherwise assured unto the said [T. L.], his heirs and assigns, in exchange for the cottages, or tenements, lands, and hereditaments, hereinafter secondly described, and of or to which the said [T. L.] is so seised or entitled as aforesaid.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance and performance of the said recited agreement, and in consideration that, by indentures of lease, and appointment and release, bearing date, respectively, the day next before, and even date with these presents, the said indenture of ap-

Consideration, conveyance from releasee to releasor of other lands,

pointment and release being expressed to be made between the said [T. L.], of the first part; the said [H. B.], of the second part; and the said [E. B.], of the third part; *He*, the said [T. L.], *hath* appointed, granted, and conveyed, the cottages, &c., hereinafter secondly described, unto and *To the use* of the said [H. B.], his heirs and assigns, *Upon trust* for the said [E. B.], his heirs and assigns; *And also* in consideration of the sum of ten shillings apiece, to each of them the said [H. B.] and [E. B.] paid by the said [T. L.], immediately before the execution of these presents, the receipt whereof is hereby respectively acknowledged; *He*, the said [H. B.], according to his estate and interest in the premises, and not further or otherwise, and at the request, and by the direction of the said [E. B.], testified by his executing these presents, *hath* bargained, sold, aliened, and released; *And* by these presents *doth* bargain, sell, alien, and release; *And* the said [E. B.] *hath* granted, bargained, sold, aliened, released, and confirmed, *And* by these presents *doth* grant, bargain, sell, alien, release, and confirm unto the said [T. L.] and his heirs, (in his actual possession, &c.) ALL, &c. AND all edifices, &c., reversion, &c., estate, &c. TO HAVE AND TO HOLD the said pieces, &c., unto the said [T. L.], his heirs and assign, TO THE USES, &c., *(uses to prevent dower)*, IN LIEU OF, AND IN EXCHANGE FOR, *All* &c., being the same cottage, &c., as are hereinbefore mentioned to have been conveyed, or otherwise assured, by the said [T. L.], unto and to the use of the said [H. B.], his heirs and assigns, upon trust for the said [E. B.], his heirs and assigns, by the said indentures of lease and release, bearing date respectively next before and even date with these presents. *(Add covenant by* [H. B.] *with* [T. L.], *against incumbrances; covenant by* [E. B.] *with* [T. L.], *for quiet enjoyment, free from incumbrances, and for further assurance, ut ante, p.* 106). PROVIDED ALWAYS, *and these presents are upon this express* CONDITION, that if the said [H. B.], his heirs or assigns, or any other person or persons lawfully claiming, or to claim, by, from, through, or under him, them, or any of them, shall at any time hereafter, without his or their wilful neglect or default, be evicted or turned out of the possession of

IN CONSIDERATION OF CONVEYANCE OF LANDS BY ANOTHER DEED.

and nominal consideration,

Release by trustee and *cestui que trust.*

Parcels.

Habendum.

To uses to prevent dower; in exchange for the cottage, &c., conveyed by releasee to releasors.

Covenants.

Power of re-entry on lands hereby conveyed, if releasor shall be evicted from possession of cottage, &c., received in exchange.

IN CONSIDERATION OF CONVEYANCE OF LANDS BY ANOTHER DEED.

the said cottage, &c., which, by the said indentures of lease and release, hereinbefore mentioned to bear date on the day next before and even date with these presents, have been or shall be appointed, conveyed, and assured by the said [T. L.], unto and to the use of the said [H. B.], his heirs and assigns, upon trust as aforesaid, by any person or persons having, or lawfully or equitably claiming, any estate, right, title, or interest in, to, or out of the same hereditaments and premises, and every or any part thereof, so as that the said [H. B.], his heirs or assigns, or any person or persons rightfully claiming, or to claim, by, from, through, or under him, them, or any of them, shall or may be prevented and hindered from holding and enjoying the same, and every part thereof, according to the true intent and meaning of the said indenture of release, bearing even date with these presents, *Then*, and in such case, it shall be lawful for the said [H. B.], his heirs and assigns, or any other person or persons rightfully claiming, or to claim, by, from, through, under, or in trust for him, them, or any of them, to enter into, have, hold, and enjoy the lands and hereditaments hereby released, or intended so to be, with their appurtenances, and to receive and take the rents, issues, and profits thereof, for his and their own use, in the same manner, to all intents and purposes whatsoever, as he or they might or could have done if these presents had not been executed, any thing hereinbefore contained to the contrary notwithstanding (*a*). IN WITNESS, &c.

(*a*) As to these clauses, *vide* an observation, *ante*, p. 88.

As to stamp duty on exchanges.

Where parties agree to exchange lands, it is usual and preferable to treat one conveyance as the consideration for the other, instead of making each for a pecuniary consideration embracing the whole value, not only because it more accurately describes the transaction, but also because it avoids the *ad valorem* duty on purchases which would otherwise be payable on each conveyance. By the stamp act (55 Geo. 3, c. 184, Schedule, Part 1), the stamp on exchanges is as follows:

	£	s.	d.
Any deed, whereby any lands or other hereditaments, or heritable subjects, in England or Scotland, shall be conveyed, or any copyhold or customary lands or hereditaments, in Eng-			

STAMP DUTY ON EXCHANGES.

land, shall be covenanted to be surrendered, in exchange for other lands or hereditaments or heritable subjects;

	£	s.	d.
If no sum of money, or only a sum under 300*l.* shall be paid, or agreed to be paid, for equality of exchange, the ordinary duty of - - - - -	1	15	0
And if a sum of 300*l.* or upwards, shall be paid, or agreed to be paid, for equality of exchange - - -	*The same* ad valorem *duty as for a conveyance on the sale of lands, for a sum of money equal to the sum so paid or agreed to be paid.*		

And where any such deed of exchange, together with any schedule, receipt, or other matter, put or indorsed thereon, or annexed thereto, shall contain 2,160 words, or upwards, then, for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, a further progressive duty of,

If the deed be liable, in the first instance, to a duty of 1*l.* 15*s.* -	1	5	0
Or if liable to a higher duty in the first instance - -	1	0	0

And any duplicate of any such deed of exchange shall be charged with the same duty or duties; and if the exchange shall be effected or secured by separate conveyances or covenants, by distinct deeds, each deed shall be charged with the same duty or duties.

And in case there shall be more than one deed for completing the title to the lands or other hereditaments or heritable subjects conveyed by either party, the principal deed only shall be charged under this head of exchange; and any subordinate or collateral deed shall be charged with the duty to which it may be liable under any other description in this schedule.

FEOFFMENT.

ORIGIN OF FEOFFMENTS.

THOUGH the term *feoffment* is clearly of feudal origin, yet this kind of conveyance is of much higher antiquity than the feudal system. The method of transferring property, by the delivery of possession, was probably common to all nations in rude ages. Gilb. Ten. by Watk. 386. It prevailed among our Saxon ancestors, who gave seisin to the purchaser by the twig and turf. A feoffment differed only in being the mode of livery peculiarly appropriated to a feudal grant. On the granting out of a pure feud to the vassal, the ceremony of investiture, or delivery of possession in the presence of the other vassals, was necessary to give effect to the donation. Feuds were at first held at the will of the lord, or for years only; but at a very early period they were granted for life, and they became at length hereditary. A feoffment was adapted for the conveyance of a free inheritance, in conformity to the grant of an hereditary feud, respect being had rather to the perpetuity of the estate granted, than to the nature of the tenure. Mad. Form. Diss. 4. But as the same form of grant had been used before feuds became hereditary, so an estate for life, or any other estate of freehold, continued to pass by feoffment, and the policy of the feudal system is still so far suffered to operate, that, if a feoffment be made without any limitation of estate, the grantor has only an estate for life. It was the act of delivering possession, which constituted the essential part of the ceremony, and which conferred the right to the land. A feoffment was consequently good without deed; and before the art of writing came into use, the delivery of seisin in the presence of witnesses was the only evidence of the grant. And when it afterwards became usual to put it into writing, the written instrument, which was called the charter or deed of feoffment, was not considered as conveying any estate or interest in the land, but merely as affording additional testimony of the transfer. Before the statute of frauds therefore, (29 Car. 2, c. 3), a feoffment, except in particular cases, (as where made by a corporation), might have been made without writing; but that statute has rendered it necessary that there should be a written instrument. Still, however, the land passes by the livery, and not by the deed of feoffment, which, without being perfected

by livery, confers only an estate at will. The deed, however, though inoperative as a conveyance, is of essential use in declaring the limitations of estate, &c. LIVERY OF SEISIN.

From the circumstance that the charter of feoffment was the mere record of the livery, arose the practice of introducing words referring to the conveyance as an antecedent act, (as that the grantor *hath* granted, &c.) which has been extended, though rather absurdly, to instruments constituting in themselves the operative assurance. Origin of words *hath* granted, &c.

Livery has been defined to be "an evidence or testimonial of the willing departing by him that makes the livery from the thing whereof livery is made, and the willing acceptance thereof by the other party." Shepp. Touchst. 209. It consists of two kinds: livery in deed, and livery in law, or within view. Livery of seisin, what.

Livery *in deed* may be made personally or by attorney, whose authority is generally contained in the deed itself, and must be strictly pursued; Co. Litt. 52. a.; though, where the authority is merely exceeded, the act is void only for the excess. See *Rowe* v. *Power*, 2 New Rep. 35. It is now settled that a power to deliver seisin, *according to the form and effect of the deed*, does not require that the livery should take place on the day of the date. *Freeman* d. *Vernon* v. *West*, 2 Wils. 165; *Roe* d. *Heale* v. *Rashleigh*, 2 B. & A. 156. It must be made however during the lives, and, it seems, during the mental capacity of the parties; Shepp. Touchst. 217; but if some only of several feoffees die, it will be good as to the rest. Perk. s. 204. So, livery to one joint-tenant is good as to the whole. Prest. Shepp. Touchst. 212. Livery *in deed*.

The form of delivering seisin is this: the feoffor and the feoffee, or their attornies, go to the door of the house, or on some part of the land, and there, in the presence of witnesses, read or declare the contents of the deed, and of the letter of attorney, if there be any; and then the feoffor, or his attorney, takes a clod of the earth, or a bough or twig of a tree growing upon the land; or the ring or latch of the door, and delivers such clod, ring, &c. and the deed to the feoffee or his attorney, using words to the following effect: *viz.* "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed; to have and to hold according to the form and effect of the same deed;" or "I deliver you seisin or possession of this house and ground, in the name of seisin of all the lands contained in this deed, according to the form and effect of the same deed." See Perkins's Every Day Book, 15 Ed. 43, sect. 209; Co. Litt. 48. a.; Shepp. Touchst. 214. But this exact form is not essential, it is enough that the act is substantially to this effect: Thus, if the feoffor take a stick, or a piece of silver, or a clod from another man's ground, or if he merely deliver the deed to the feoffee, saying "have and enjoy the house or land according to the deed;" or "I am content that you shall enjoy this land," or the like, it is a good livery of seisin. Ib. But the mere exe- Form of making it.

LIVERY OF SEISIN.

cution of the deed on the land, unless the intention also to deliver seisin be distinctly manifested, will not be sufficient. *Mill's* and *Snowball's case*, 1 Leon. 207; See also *Sharp's case*, 6 Rep. 26; *Vaughan* v. *Holdes*, Cro. Jac. 80.

Actual dereliction of premises by *all* persons not necessary.

Mr. Justice *Blackstone*, 2 Comm. 315, and some other writers, (see 2 Sand. on Uses, Feoffment, 5), have described the ceremony of livery of seisin, as if it were absolutely requisite, that all persons other than the parties should actually leave the house or ground; but this must be understood with some qualification; for it has been held, first, that livery by a lessee, the lessor being on the premises and not contradicting it; *Metteforde's case*, Dy. 362 b; *Read* v. *Errington*, Cro. El. 322; or by the lessor, the lessee being on the premises *and assenting*, is good; 2 Roll. Ab. 5, 1. 15; Dyer, 33 a; 2 Rep. 31 b; Shepp. Touchst. 207; but the assent of a tenant at will is not required, the entry and delivery of seisin by the lessor being a determination of the tenancy; Dyer, 18 b; and this of course applies to indifferent persons. All that is essential in this respect to the validity of the livery is, that it should be made either in the absence of all persons in possession, their wives, servants, &c. Co. Litt. 48. b.; Dyer, 18 b, or with the consent of such persons, (though the consent of a servant is not sufficient);—that *the possession should be vacant*, and not that the house, &c. should be empty. If it were otherwise, it would in many cases be difficult, if not impossible, to deliver seisin, as in the instance of a person being ill in the house, or of a public inn; and the livery would be liable to be defeated by a person being concealed in the house, or, where the estate was large, in a remote part of it.

Possession must be vacant.

Possession when held *not* to be vacant.

But as no person can deliver seisin, without being himself seised, and as the law will presume, *cæteris paribus*, in favour of the rightful owner rather than another person, it is clear that if a man enter into my lands by wrongful title, and, *I being there*, he enfeoff a stranger thereof, and deliver to him seisin, this is void. Perk. 45, s. 219.

Feoffment by joint-tenant,

So, if one joint-tenant, the other being upon the land, enfeoff a stranger of the entirety, this will be good as to a moiety only. Perk. 220. Had the livery been effectual of the whole, his companion would have been disseised. *Townsend's* and *Parton's case*, 3 Leon. 52.

Where the person *entitled to the possession* is on *any* part of the land, though at a distance from where livery is made, (assuming, of course, that his assent has not been obtained), it is void as to the whole. *Heyward* v. *Bettis*, Moore, 250, pl. 397; *Bettisworth's case*, 2 Rep. 31.

Livery *in view*.

The form of making livery *in view* is this: The feoffor (both parties standing within view of the land), delivers the deed to the feoffee, saying

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"I will that you enter upon yonder land, and have it according to *the deed," or to this effect. But livery in view cannot be made by attorney. It is also essential to it that the parties should be within actual view of the land, though they need not be in the same county.

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Lands in several counties or occupations.

Where the lands lie in one county, and are in the occupation of the feoffor or of the same tenant or tenants, (unless in the case of tenant at will, Dy. 18 b), it is sufficient to deliver seisin of one piece in the name of the whole; (see *Lochy* v. *Dumiloe*, Styles, 363); but if they are situated in several counties, or are in the occupation of different tenants, a distinct seisin must be delivered of the land in each county, or in each occupation. Doct. & Stu. 3; Perk. s. 227, 228; Co. Litt. 48. a.; Shepp. Touchst. 217. But livery within view may be made of lands in several counties, 2 Bac. Ab. 486, and it should seem in several occupations.

What estates may be created by feoffment.

As the design of the ceremony of livery, obviously, is that the county may know in whom the freehold is vested, it follows that an estate of freehold transferred thereby must be immediate and not future; see *Bullock* v. *Burdett*, Dy. 281 a; 5 Rep. 94 b; and therefore the limitation of an estate to A. and his heirs, after the death of B., is void in a feoffment. But it is to be observed (though the point is sometimes stated without this explanation, so as easily to give rise to misconception, that a future or springing *use* may be limited to arise on an immediate seisin. Thus, it is clear that if a feoffment were made to A. and his heirs, To THE USE of B. and his heirs, *after the death of C.*; or, to the use of the feoffor and A. and the heirs of their bodies *after their marriage*, the limitation of the future use would be good, and the use would in the meantime result to the feoffor. *Woodliff* v. *Drury*, Cro. El. 439; see also Sir *Edward Clere's case*, 6 Rep. 18; *Weale* v. *Lower*, Poll. 59. And even at common law, if the freehold be limited by way of remainder after a term of years, and livery be made to the lessee, it is good. Co. Litt. 49. b. And here it should be noticed, (though the point does not exclusively apply to feoffments), that, according to several early authorities, *Adams* v. *Savage*, 2 Lord Raym. 855; *S. C.* 2 Salk. 680, stated Sugd. Gilb. 166; see also *Rawley* v. *Holland*, 22 Vin. Abr. 189, pl. 11; *Goodtitle* d. *Weston* v. *Burtonshaw*, Butl. Fea. 570; *Jackson* v. *Jackson*, Fitz. 146, a use limited after the determination of an estate less than freehold, as to A. for ninety-nine years, if the feoffor so long live, and then *to the heirs male of his body*, cannot, because in point of form limited as a remainder, take effect as a springing use, though otherwise void *ab initio*. But as there can be no *remainder* of inheritance, unless a particular estate of freehold be first limited, (the possession of the termor not suspending, but co-existing with the seisin of the reversioner), the obvious answer to this doctrine is, that the limitation in question is *not* a remainder, but the entire inheritance limited in contingency after the limitation of a term, on *which it is in no way expectant. Such a limitation would clearly be good in a will, by way of executory devise; *Harris* v. *Barnes*, 4 Burr. 2157; and has sometimes been supported in deeds, (though upon principles which it is not very easy to understand), by implying an estate for life in the

Whether a use limited as a remainder after a term be valid.

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grantor or feoffor. On this point the reader should consult Mr. Sugden's note to Gilb. p. 164.

Purposes for which feoffments are *now* made.

Since the Statute of Uses, and the introduction of the conveyance by lease and release, feoffments have been but little used, except in the three following instances: First, where the conveyance is made by a corporation; for a notion having obtained, though erroneously, that as corporations could not be seised to the use of others, they could not convey by a deed operating under the statute of uses, (see Sugd. Gilb. Us. 7, n.), it became usual to make them convey by a lease at common law, (*i. e.* to be perfected by entry), with a release founded thereon, or, which was in general more convenient, by feoffment. Secondly, to avoid the expense, in small transactions, of a bargain and sale for a year; but as the legislature has imposed on them an additional stamp of 1*l.* 15*s.* (see stat. 55 Geo. 3, c. 184), which equalizes the duty with that of a lease and release, little is now gained in this respect. Thirdly, to acquire a tortious fee, in order to support a fine, and by that means gain a title by non-claim; or, sometimes, in order to make a tenant to the *præcipe* for suffering a recovery, particularly where it is doubtful whether the seisin is in the person by whom the immediate freehold is to be conveyed, or the freehold is in an infant; for, in the latter case, as the feoffment confers a *voidable* estate, (and is not void), provided the livery be made by the infant in person, *Whiting's case*, 8 Rep. 42 b, it is sufficient for the purpose of the recovery. See Harg. & Butl. Co. Litt. 278. b. n.

Operation of feoffment as a tortious conveyance.

It is in the latter point of view, (*i. e.* regarded as a tortious conveyance), that the operation of feoffments presents the most interesting matter for consideration to the modern practitioner, and it is to this point, therefore, that the reader's attention will be more particularly directed.

Possession only necessary.

In order to give effect to a feoffment at common law, it was sufficient that the feoffor had a mere naked possession; and, therefore, if he were only tenant for life, or for years, *Fitzherbert* v. *Fitzherbert*, Cro. Car. 483; *Whaley* v. *Tankard*, 1 Lev. 52, and see Cro. Car. 304; *Parkhurst* v. *Smith*, lessee of *Dormer*, Willes, 341, or had no estate or interest (*a*), yet
[*118] his feoffment was said to pass a clear freehold in fee *simple. Thus, we find, in the early authorities, the question is stated to be, whether the *livery of seisin* was good; for if there was a good livery, (to which actual

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(*a*) It seems that the widow of a tenant for years, or at will, who makes a feoffment, is dowable out of the tortious fee thus acquired; but where the feoffor is tenant for life, his widow is *not* dowable. *Moseley* v. *Taylor*, Sir Wm. Jones, 317; Harg. & Butl. Co. Litt. 31. b. The ground assigned for this distinction, by an eminent writer, 2 Prest. Abst. 323, is not very satisfactory, as the reasons applied to the respective cases are common to both.

seisin alone was necessary), the feoffment was operative as between the parties, and against all persons other than the disseisee, who might of course enter for the forfeiture immediately, or, if he pleased, wait for the natural expiration of the estate of the person making it. See *Salvin* v. *Clerk*, Cro. Car. 156. And where a tenant for life in remainder concurred in a feoffment made by the tenant for life in possession, a right of entry was held immediately to accrue to the ulterior remainder-man. *Blackaller* v. *Martine*, Dy. 338 b.

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In order to explain the principles upon which this doctrine was founded, it will be necessary to have recourse to the policy of the old law; by which, whoever had the actual possession was deemed to have the freehold, or, if he was merely tenant for years, his possession was considered to be the possession of the freeholder; for the policy of the times required that the ownership should be a matter of public notoriety, and that there should be as little occasion as possible to look beyond the person in possession. The possession and freehold being therefore nearly synonymous, nothing further was necessary to the transfer of the one than the delivery of the other. Where a man being in the possession of the soil gave livery of seisin to another, the freehold passed as incident to the possession. If we add to this the solemnity and notoriety of the ceremony of livery, and the necessity there was that a feoffment, which was the only mode of evidencing the transfer of property, should have the most complete effect, we may perhaps be able to account for the powerful operation of this species of conveyance.

Origin of disseising operation of feoffments.

In consequence of this operation of a feoffment to create a tortious freehold, it became, *and has continued to this day*, a common practice, for persons who were in possession under a title discovered to be defective, to make a feoffment in order to acquire the freehold, and then levy a fine with proclamations, by which, under stat. 4 Hen. 7, c. 24, (stated *infra*), their title was indefeasible against all persons, not under disabilities, at the expiration of five years from the period of levying the fine. Unless the freehold were originally in, or were by this means acquired by the conusor, the fine was void, and might have been avoided upon the plea *ut partes finis nihil habuerunt tempore finis levati*. Lessors would thus have been liable to eviction, by the secret acts of their tenants; but it was held that feoffments executed by tenants *who continued to pay rent*, were fraudulent and void. *Fermor's case*, 3 Rep. 77; *S. C.* 2 And. 176; *White* v. *Bacon*, Saville, 126.

As to termors acquiring a tortious fee, and assigning the term to attend it.

Where lands were held for an old term (originally created by a mortgage or otherwise), a scheme was at one period in repute, by which it was thought to be practicable both to acquire the fee, and preserve the *term. One of the modes of effecting this, recommended by a gentleman of eminence, was, that the term should be first assigned to a trustee, that a feoffment should then be executed, and afterwards the term declared to at-

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tend the inheritance according to the uses created by the feoffment. This mode, it was conceived, would give the purchaser a good title against all persons except the lessor or reversioner, who could claim no title till the expiration of the term; but it was deemed eligible only in case such lessor or reversioner was unknown. See Sugd. Vend. & Purch. 5th ed. 252, n. (*a*). Another plan recommended, was, that the feoffment should be followed up by a fine. Thus, suppose A. possessed of a mortgage term under a foreclosure (the owners of the reversion in fee being unknown, he should first assign the term to an indifferent person, a feoffment with livery should be then made, and a fine levied. The uses of the feoffment and fine were to be declared to the feoffor or a purchaser, and the term declared to attend the inheritance according to those uses. By this process, it was thought the termor might absolutely acquire the fee, there being no privity between him and the reversioner after foreclosure. 2 Sand. Us. 4th ed. 22.

Objections to the scheme for preserving the term.

But it is submitted, that neither of these modes is adequate to the attainment of the end in view, (*i. e.* the conversion of the leasehold tenure into freehold), and that all experiments of this nature are attended with the risk of a forfeiture of the term, without the possibility of acquiring, during the period of the term at least, a perfect title to the fee. If the term be not forfeited, it may be asked, how the title to the fee can be changed? The only mode of operating upon the fee is by repudiating the title of the reversioner by a forfeiture of the term, giving the reversioner a right of entry, for the purpose of restoring himself to his old dominion; *so long, therefore, as the term subsists undisturbed, the reversion expectant on it will likewise remain unaffected.* The preservation of the term seems to be utterly inconsistent with the acquisition of the fee. On the other hand, if the term be forfeited, the reversioner may enter for the forfeiture, at any time within twenty years after the feoffment, if no fine be levied, or, if a fine with proclamations be levied, at any time within five years from the last proclamation; or if he do not choose to take ad-

[*120] vantage of the forfeiture, he may yet (for he has two periods *of entry), enter within five or within twenty years, as the case may be, after the natural expiration of the term, *vide infra*. Thus, in whatever way the matter be managed, the party will be exposed to eviction by the entry of

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(*a*) It is but fair to state that Sir E. B. Sugden has expunged this note from the late editions of his useful work. As the editions, however, containing this suggestion were widely circulated, and the practice is not even now exploded, but has, with some modification, been recommended, more or less distinctly, in several recent publications, the editor has thought that he should render an acceptable service to the profession in examining rather at large the grounds upon which it rests.

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the reversioner within five years at least; and even after the entry for the forfeiture has been barred by the statute of limitations, or by non-claim under the statute of fines, the title will not be marketable as a freehold title, on account of the right of entry accruing to the reversioner, after the expiration of the term; though, if the term be long, as one thousand years for instance, this right, it is obvious, will be merely nominal.

The forfeiture of the term supposes that the feoffment will be made by or with the privity of the termor; for, if he be privy to it, that is enough to induce a forfeiture; (see Co. Litt. 252. a.); and it is clear, according to the first of the modes above suggested, that the assignee of the term would be privy to the tortious act, and that the assignment, feoffment, and declaration of trust, would constitute one transaction, designed to wrong the reversioner. If the assignee of the term be considered as *not* privy to the feoffment, then its effect would be to divest the term and the reversion, and both being adverse, might be barred by the statute of limitations or non-claim on the fine; but in the meantime both might be restored by the entry of the termor or the reversioner. See Hard. 417.

The inexpediency of attempting, in the case just discussed, to change the character of the tenure by means of a feoffment, is further illustrated by a recent case, where the Court of King's Bench is said to have treated a term under the circumstances in question *as forfeited*. Lord *Dormer's* Ejectment, cited by Mr. Preston, 3 Barn. & Cress. 399, and stated to have been decided in Hilary Term, 1817.

Remarks on another plan for changing the tenure.

In a late publication it is suggested, that, to avoid a forfeiture of the term, it should, previously to the feoffment, be assigned to a trustee, care being taken to avoid any allusion to the intended feoffment, and that, after the feoffee's title has, by the operation of the fine and non-claim, become indefeasible, the term should be assigned to attend the inheritance thus acquired. Coventry's Watk. Princ. Conv. 253. This plan probably was suggested by the late case of *Reynolds* v. *Jones*, 2 Sim. & Stu. 256; where lands were devised to A. for five hundred years, to raise money to pay debts, and subject thereto to B. for life, with remainders over; B. levied a fine in fee, and afterwards sold the lands to A., and A., after the levying of the fine, but before the execution of the deed declaring the uses, assigned the term to a trustee for himself, and to attend the fee. The remainder-man of four-fifths of the land entered in due time after the death of B., and filed a bill to recover the property; and Sir *John Leach*, V. C., held him to be entitled. Now, as A.'s claim to relief in *equity* could only be founded on the existence *of the term, which formed an impediment [*121] to his recovering at law, it may be thought that, by entertaining the suit, the Vice-Chancellor virtually decided that the term was subsisting; and some of his observations certainly favour the supposition that this was his opinion. It seems, however, that the attention of the Court was not drawn to the point in discussion, (the only question discussed being whether the

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plaintiff was entitled to an account of profits antecedently to his entry, or bill), nor was it indeed open to the defendant, who had himself in the first instance assigned the term, and then directed an assignment of it to attend the inheritance, to avail himself of the forfeiture, as an objection to the plaintiff's claim to relief. It is too much, therefore, to rely upon this case as supporting an hypothesis so completely untenable in principle; for the scheme in question seems to be obnoxious to the whole force of the reasoning applied to the other attempts for preserving the term for the purpose of attending the tortious fee. There is no solid difference, it is conceived, between previously assigning the term to the particular uses of the intended feoffment, which creates the disseisin, and subsequently to attend the fee so acquired. In both cases the termor renounces the title of the reversioner, and therefore forfeits the term. Besides, if the term be not forfeited, prior to the *second* assignment, (which it seems it would not be if the trustee in whom the term is vested, preparatory to the feoffment and fine, be not privy to the tortious act), the fine is adverse to the termor, and bars his right by non-claim in five years. Hence the obvious incongruity of getting in the term after this period. By treating the term as subsisting, the tortious alienee perpetuates the adverse claim of the reversioner; for it is clear that, while the term remains, he is not absolutely barred, since the reversioner has five years from the period of its expiration. Indeed, it may be contended, that, unless the term be forfeited or barred, the fine is wholly inoperative against the reversioner by non-claim; for it is an established doctrine that non-claim can only arise where the possession is adverse, (*vide infra*), and as the possession of the termor is the seisin of those in remainder, and the possession in this instance is according to the trusts of the term, it may be said that the possession is exactly consistent with the title alleged to be displaced by the fine, and therefore the fine has no operation. This might have been urged in support of the plaintiff's claim, in *Reynolds* v. *Jones*, to the undivided fifth share, the title to which was treated as barred by the fine.

Operation of feoffment to create disseisin.

The preceding remarks, it will be perceived, apply only to the project of attempting both to acquire the fee, and at the same time preserve the term. No doubt was ever entertained, that a termor, or any other person in possession, (who did not continue to recognise his lessor's title by the payment of rent, *sup.* p. 118), *might* acquire a tortious fee by feoffment, if he chose to take the risk of an entry by the lessor *for the forfeiture. Within the last century, however, a doctrine has sprung up in Westminster Hall, which is calculated to diminish our confidence in titles derived even in this manner; for it has been held that a feoffment made by a person in possession operates a disseisin only *at the election of the rightful owner*.

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Disseisin at *election.*

Case of *Taylor* v. *Horde.*

This doctrine was advanced in *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 60; *S. C.* Co. Litt. 330. b. Butl. n.; 5 B. P. C. 247; Cowp. 689, which was in substance as follows: A. (a jointress) was tenant for life under a settle-

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ment, remainder to B. in tail male, remainder to J. and his younger brothers successively in tail male, remainder to R. A. in fee. B., in conjunction with the trustee of certain termors, brought an ejectment against A., and recovered; on what ground does not appear. He then, being in possession, executed a feoffment with livery of seisin, in order to make a tenant to the *præcipe* for suffering a common recovery, to the use of himself and his heirs; which recovery was suffered accordingly. A. having in the meantime died, and R. being also dead without issue, an ejectment was brought by J. against the heirs of R., the recoveror, on the ground that the recovery was invalid, the recoveror being tenant in tail *in remainder* only, and therefore incapable of making a good tenant to the *præcipe*. But the Court of K. B. held that twenty years having elapsed since J.'s title accrued, his remedy by ejectment was barred. Lord *Mansfield*, however, entered at large into the question of disseisin, and came to the following conclusion: first, that the entry by B. under the ejectment was no disseisin; and secondly, that the feoffment operated as such only at the will of A., the rightful owner. His Lordship said, he could not think of a case (unless in regard to fines under stat. 4 Hen. 7,) where the true owner, whose entry was not taken away, might not elect, by choosing a possessory remedy, to be deemed as not having been disseised (*a*). The point afterwards *came before the Court of K. B., on an ejectment by the heir of [*123] R. A., whose title having recently arisen by the death of J. without issue, was not barred by length of time: and the Court held, that there was no disseisin, and therefore the recovery was invalid; and they founded this opinion mainly on the principle that feoffments had lost the efficacy which the early authorities ascribed to them; for that "where the books speak of feoffments in fee by tenants for years, and that the fee-simple passes thereby, it is to be understood of those feoffments of old, attended with livery, and the actual transmutation of the possession from one man to another;

(*a*) Disseisin by election seems to have been the converse of this; for it arose where a man, who was kept out of the freehold wrongfully, though not actually disseised, feigned himself to be disseised, in order to resort to the assize of *novel disseisin*, which was the easiest remedy for the recovery of land, prior to the introduction of ejectments. See judgment in *Blundell* v. *Baugh*, Cro. Car. 302; 3 Blackst. Comm. 170; 2 Sand. Us. 18. As to disseisin at election *of rents*, see Co. Litt. 323. a. It is suggested, however, whether the double period of entry allowed to a reversioner, where termor has committed a forfeiture, namely, the time of forfeiture, and the natural expiration of the term, and which gives him an election to treat the term as forfeited or subsisting, (*vide supra*, p. 119, and *infra*), does not afford some support, by analogy, to Lord *Mansfield's* doctrine of disseisin by election.

Disseisin *at election*, properly so called.

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that feoffments from having been the only conveyance of land for a long term of years, *have languished into mere form, and are nothing now more than a common conveyance.*"

Mr. Butler's conclusions in regard to disseisin by feoffment.

The doctrine of this case has been much canvassed, particularly by the learned editor of Coke's first Institute, (Co. Litt. 330. b. Butl. n. See also 2 Sand. Us. 14), who has shewn by the most irrefragable arguments, drawn from a train of authorities from Bract. 11 b, to 2 Ves. Senr. 481 (*a*), (into the consideration of which our limits will not permit us to enter),—

1*st*, That as feoffments have not, since Hen. 2, been made with any other solemnities than at present, their operation to produce disseisin, which has often been recognised since that period, still continues.

2*dly*, That this disseisin must be understood to be an actual disseisin, and not merely at the election of the party.

3*dly*, and 4*thly*, That however bare or tortious the possession of the feoffor is, (whether he be a copyholder, tenant for years, by *elegit*, statute merchant, statute staple, at will, or by sufferance), his feoffment vests the freehold in the feoffee, until avoided by the entry of the disseised owner.

Lastly, That a fine may be levied, or a recovery suffered on this freehold, which are immediately good against every person but the rightful owner, and in process of time become good against him. Mr. Butler, however, contends that these conclusions, though opposed *to the doctrines advanced in *Taylor* v. *Horde*, are not inconsistent with the case itself, as B., the feoffor, appeared to have recovered against A., the tenant for life in possession by a pretended title, and his feoffment might, therefore, be considered as fraudulent.

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The case, indeed, has been but little regarded in the profession, and the practice of levying fines on a freehold acquired by means of a feoffment, has continued to the present time. The late case of *Doe* d. *Maddock* v. *Lynes*, 5 Dowl. & Ryl. 161, *S. C.* 3 Barn. & Cress. 388, however, affords strong ground to doubt, whether at this day the Courts would allow

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(*a*) It may be observed that these authorities principally consist of incidental allusions to, rather than any direct adjudications upon the doctrine in question, which affords convincing proof that it was regarded as a settled principle and not open to controversy. Both Sir Matthew Hale, (see *Focus* v. *Salisbury*, Hard. 402), and Lord Hardwicke, (see *Shields* v. *Atkins*, 3 Atk. 562; *Smith* d. *Dormer* v. *Packhurst*, Id. 140), refer to tenants for years levying fines, in order to acquire a tortious freehold, as a common practice. And Lord C. J. *Abbott*, in *Doe* v. *Hull*, 2 Dowl. & Ryl. 41, (on which decision some observations will be found in the sequel), adverted to this operation of a feoffment.

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Case of *Doe* v. *Lynes.*

to such or indeed any feoffments the operation in question, however apparently well established by the early authorities. That case was as follows: T. Cooper being possessed of two terms of ten thousand years, and one of one thousand years, granted in the reign of Queen Elizabeth, on his marriage, in 1771, assigned the premises to trustees for the residue of the terms, in trust for himself, his executors, &c. until the marriage; and after the solemnization thereof, in trust for himself for life, and after his decease, for E. Kiss his intended wife for life, and then for the issue of the marriage; and in default of such issue in trust for the executor or administrator of himself. By indenture of feoffment dated the next day, accompanied with livery of seisin, T. C. and certain other persons, (for whose concurrence no reason appears), by his direction, in consideration of the marriage, &c., granted the premises to W. C. and J. K., and their heirs, to hold to them, their heirs and assigns, to the same uses as the premises then stood limited to, until the marriage; and after the solemnization thereof, to the use of himself for life, with remainder to the use of E. K. for her life, remainder to the use of the heirs of the body of Cooper, on the body of E. K. to be begotten, with reversion to the heirs and assigns of Cooper. A power of revocation was reserved to T. Cooper and E. Kiss. There was no issue of the marriage; and after his death the trustee of the term for his widow received the rents. On the death of the latter, the heirs at law of Cooper brought an ejectment against the trustee of the term, which raised the question whether the fee had been acquired, and the term destroyed by the feoffment of 1771. The affirmative of both these points was strenuously maintained by the counsel for the lessor of the plaintiffs; but the Court decided against him upon the latter ground, and expressed a strong opinion as to the former in favour of the doctrine of the case of *Taylor* v. *Horde*. Lord C. J. *Abbott*, founded his judgment upon the ground that the feoffment did not operate to destroy the term of years, because it did not appear to have been made with the consent of those who had the term. At the same time he would not be considered as assenting to the doctrine advanced upon the first part of the case. *There was so much good sense in the doctrine laid down by Lord Mansfield,* (in *Taylor* v. *Horde*), *that he should be sorry to find any ground for saying that it could not be supported.* "It is admitted," continued his Lordship, "in this case, that if there be a lease for a term of years in possession, and a feoffment be made by a stranger, that that feoffment would not be good unless the lessee assented to it (*a*). Now, at the time when the feoffment in this case was made, Cooper had ceased to be the lessee for the term of years; for the very day before the feoffment was executed, he had conveyed his interest in the term to two trustees. When the feoffment was executed,

Lord C. J. *Abbott.*

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(*a*) Clearly it would, *if the stranger were in possession.*—Ed.

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therefore, the term was in them. Is there any thing on the face of this case to shew that they assented to the feoffment? If that assent was given, it ought either to have been expressly found, or facts should have been stated necessarily leading to the conclusion that such consent was given; but no such facts are stated in this case. It appears, indeed, by the recital in the indenture of assignment, that it was made in consideration of a marriage, intended to be had between the assignor and Elizabeth Kiss, and for the considerations mentioned and expressed in a certain indenture of three parts, intended to bear date the day after the date of the assignment; and made between (his Lordship named the parties). Now I cannot, from this recital, collect that the assignees accepted the term upon certain trusts, for the purpose of enabling Cooper to make a feoffment, and so destroy the term, and defeat the trust. The intended deed is not called an indenture of feoffment in the deed of assignment, and I cannot therefore say, that these trustees were informed that an indenture of feoffment was intended; and one reason why we should not presume that they assented to such a deed is, that the objects of the assignment would thereby be defeated. Then it is argued, that Cooper's possession was adverse to the trustees of the term; but I cannot accede to that, because, by the assignment, he was to have the beneficial enjoyment, so that his possession was consistent with the terms of the trust. The foundation of the argument urged in this case, therefore, fails; because there is nothing to shew that the trustees assented to the destruction of that term, or to the feoffment which was afterwards executed. Whether this feoffment worked a forfeiture or not may be a question between the reversioner and the lessee; but not appearing to have been made with the assent of the assignees of the term, it is of no avail against them. For these reasons, I think the judgment of the Court must be for the defendant.

Mr. J. *Bayley*. [*126]

Bayley, J.—"It is conceded that the rightful fee is, or ought to be, in the original lessor, or in his representatives. Here an attempt has been made to turn the term into a wrongful fee, and so to vary the *relative situation of the lord and third persons. One of the consequences that would result from the doctrine contended for in argument would be, that this property, which before would have been liable as a chattel interest to the payment of debts, would be transmitted to the heir-at-law, free from those burthens to which it would be liable in the hands of the personal representative (*a*). It is said, that since the introduction of common recoveries, it has been the common practice with conveyancers to make a feoffment with livery of seisin of the land to the person against whom the writ of entry was intended to be brought, the opinion being,

(*a*) As to the applicability and order of application of real estate to debts, see Jarman on the Construction of Devises, p. 644, 667.

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that the feoffment was the most secure conveyance by which a tenant to the *præcipe* could be made; because, if the feoffor is in possession at the time when the livery of seisin is made, the feoffment is supposed to pass a good estate of freehold, either by right or by wrong. But a Court of law ought to set its face against deeds which are intended to work fraud or wrong, and I am glad that in this case there is sufficient ground for saying that the feoffment is not to take effect. It is a general rule that unless the persons entitled to the actual possession concur in the feoffment, it will not defeat their interest. That being so, the term in this case continued against all persons but the lord. It is unnecessary to say whether it continued as against him, for in this case the day before the feoffment was executed, the interest which Cooper had had in the term was assigned to two trustees. They then took the legal interest in the term, upon trusts which would probably continue for a long time, and it was their duty not to lend themselves to any act tending to defeat that interest. We must presume that they did their duty, and therefore that they did not concur in any act to defeat the term. It is not found as a fact in the case, that the feoffment was executed with their consent; and if it was not, then it is conceded that the term was not destroyed, because the trustees were entitled to the actual possession, and we must therefore presume that they had it. As it does not appear, therefore, that the feoffment was made with their concurrence, the term is not defeated. The lord may, if he pleases, insist upon the forfeiture, and that will raise a different question, which it is not necessary now to decide."

Holroyd, J.—" I think, even supposing that it had appeared by the facts of this case, that the trustees of the term had assented to the feoffment, the term would not thereby have been destroyed, except at the election of the lord, who might have taken advantage of it. But their consent is not to be presumed, and it is not found as a fact; nor are any facts stated, which would necessarily lead to the conclusion that there was such a *consent. It is admitted that a feoffment by a stranger would not operate as a destruction of the term. The passages cited from Littleton and Lord Coke, upon the general nature of disseisin, are considered by Lord *Mansfield* to apply to disseisin by election. In this case the actual possession continued the same as if the term had continued, and the parties had enjoyed the possession under the term; and if so, then the possession is to be considered as founded upon the right, and not upon the wrong, by analogy to the principle of remitter. The greatest mischief might arise in cases of this kind, if secret conveyances like these were to operate against parties really interested. *The nature of a feoffment and disseisin are materially altered since the time when Littleton wrote. Such a case as this differs materially from that where an actual ouster of the freeholder formerly took place. The latter then no longer performed the services. There was not only a change of possession, but the person taking posses-*

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sion was adopted by the lord, and allowed by him to perform all the functions of tenant. It has been admitted, that, in order to make the feoffment effectual in this case, the tenant ought to have been ousted, or that his consent ought to have been gained. For these reasons I think that the lessor is not entitled to recover."

Observations upon *Doe* v. *Lynes.*

It will be observed, that in this case it was not necessary to decide whether or not the terms were destroyed, as between the termors and the reversioner, and the Court avoided expressing a positive opinion upon the subject, though they considered it to be clear that no destruction had taken place as between the parties. For this purpose, therefore, they evidently treated the feoffment of T. Cooper as the act of a stranger, and not of the termors. Now, admitting that the act of the *cestui que trust* of a term, having, as in the case of T. C., only a limited interest, and done without the privity of the legal owners of the term, ought not to be held to destroy it, to the prejudice of the other persons interested, yet it seems to be difficult to avoid the conclusion that by this act the termors were *dispossessed.* Their possession was the seisin of the lessor, and a tortious alienation in fee necessarily ousted both. The feoffment in question must either be regarded as the act of the termors, or the act of a stranger, or, in other words, as done with the privity of or adversely to the termors. If the former, the terms were destroyed; if the latter, they were turned into rights. From one of the horns of this dilemma, it seems to be impossible, consistently with the early authorities, or the general principles of law, to escape. In saying that a feoffment should be made with the consent of the persons *entitled* to the possession, the learned Judges evidently confounded the actual possession with the *title* to the possession; for the notion, that the consent of the persons having the latter was necessary to the validity of a feoffment, is quite untenable, nothing more than the actual possession being, we have seen, requisite. Besides, the *argument [*128] was inconsistent with the observation, also made, that the possession of Cooper was consistent with the trust of the terms, which treats him, in fact, as being in possession. The argument, however, that the possession of Cooper was not adverse, rather begs the question; for if a fee were acquired by his act, his possession from that moment became adverse. It is to be observed, moreover, that some of the reasoning of the learned Bench impliedly admitted that the feoffment, if it had been made with the privity of the trustees of the terms, would have been a forfeiture of these terms, which goes far towards acknowledging that, *not* being made with their privity, it was an ouster of them. Such an argument, however, clashes with the position of Mr. Justice *Holroyd*, who, following the Judges that decided *Taylor* v. *Horde*, declared feoffments to have lost their efficacy with their publicity. If this ground can be sustained, of course feoffments are as inoperative to occasion a forfeiture by a lessee as the most innocent assurance. But, we may be permitted to suggest, whe-

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ther, assuming the interests of justice to require that they should be deprived of the operation in question, the object be not out of the scope of judicial authority, and attainable only by an act of the legislature. To hold that the established principles of law are to change with the ever fluctuating state of society, is, it is humbly apprehended, a doctrine pregnant with danger to the community. Before the case of *Taylor* v. *Horde*, it might have been as little expected that a Court of justice should declare that the law of primogeniture had ceased with the feudal system out of which it grew, as that feoffments had lost their efficacy, because the notoriety from which they had originally derived it did not continue to accompany them. And let it be observed, that the consequences of the doctrine in question are by no means confined to the circumstances of the particular cases in which it has been broached; for if feoffments have lost their efficacy for one purpose, they must have lost it for all purposes, and it must be affirmed (bold as the position may appear), that the feoffment of tenant in tail in possession no longer creates a discontinuance, so as to put the issue in tail and the remainder-men or reversioners to their real action, though the books are full of the learning on this head. See Com. Dig. 488; Co. Litt. 326. b. 327. a. 330. a.; 8 Vin. Ab. 513, see also 1 Prest. Abst. 146, 367; 2 Ib. 303 (*a*).

It would also follow that feoffments in fee by tenants for life, or for *years would be inoperative to produce forfeiture, or (which indeed is a consequence of forfeiture,) to destroy contingent remainders. [*129]

Practical conclusion from *Doe* v. *Lynes*.

Upon the whole, the practical conclusion to be drawn from the case of *Doe* v. *Lynes* seems to be, that though even now parties may be advised, where the value of the property justifies the expense, to make a feoffment, and levy a fine in support of a title otherwise irremediably defective; yet, that no title derived in this manner is to be relied on; and persons possessed of long terms of years, however old in their creation, are to be dissuaded from making the experiment of acquiring the freehold by such means.

Comparative advantages of freehold and leasehold tenure.

The principal advantages to be derived from the change of tenure, is the exemption from probate and legacy duty, and the possession of those rights and privileges which appertain to the freehold, as (where the premises are of the clear annual value of 40*s*.), the being entitled to vote at the election of Knights of the Shire to serve in Parliament, &c. But these advantages can hardly be considered to counter-

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(*a*) In order to work a discontinuance, the feoffment must be by tenant in tail in *possession;* and, therefore, where lands were limited to A. for life, with remainder to trustees during his life to preserve, with remainder to the heirs of his body, (in which case A. is tenant in tail in remainder, by the rule in *Shelley's case*), a feoffment by A. was held to have no such effect. *Doe* d. *Jones* v. *Jones*, 1 Barn. & Cress. 238; *S. C.* 2 Dowl. & Ryl. 373.

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balance the inconvenience of exchanging a marketable for an unmarketable title; to say nothing of the possibility of eviction, and the litigation to which such a state of the tenure is likely to give rise. Besides, terms of years possess some advantages over freeholds: they pass by a simple transfer without enrolment, livery of seisin, or a lease for a year, and, when vested in a married woman, do not require a fine; they may be bequeathed by an unattested will, and are not subject to dower, or liable to be affected in the hands of purchasers by judgments, &c.

In respect to the other purposes for which feoffments have sometimes been resorted to, from their peculiar operation in creating a disseisin, as to make a tenant to the *præcipe* for suffering a common recovery in certain cases, (*sup.* p. 117), or where an old legal estate was outstanding, and it is not known in whom, which frequently happens in the case of charity lands, though it is not probable that feoffments will be wholly disused, yet they must be confided in with caution.

See further as to Feoffments, Viner & Bacon's Abridgments, title *Feoffment;* various references under this head, in Harg. & Butl. Co. Litt.; Prest. Shepp. Touch. 203; and 2 Sand. Us. & Trusts, 1.

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SHORT FEOFFMENT, WITH GENERAL WARRANTY.

FEOFFMENT *of Lands in Fee, with general Warranty.*

Premises.

Testatum.

THIS INDENTURE, made, &c.—BETWEEN [*feoffor*], of &c., of the one part; and [*feoffee*], of &c., of the other part; WITNESSETH, that, for and in consideration of the sum of one hundred pounds, of lawful money of Great Britain, by the said [*feoffee*] to the said [*feoffor*] in hand well and truly paid, at or before the sealing and delivery of these presents, the receipt whereof, and that the same is in full for the absolute purchase in fee-simple of the hereditaments hereinafter mentioned (*a*), he doth hereby

(*a*) The introduction of a purchase deed in this place is a violation of the general arrangement of the work, (which classifies the deeds according to their object and effect, and not according to the nature of the instrument), but in this instance it has been done in order to illustrate a suggestion contained in a subsequent note. *Vide infra*, p. 139.

SHORT FEOFFMENT, WITH GENERAL WARRANTY.

acknowledge, and thereof and therefrom, and of and from every part thereof, doth acquit, release, and discharge the said [*feoffee*], his heirs, executors, administrators, and assigns by these presents, he the said [*feoffor*] *Hath* granted, enfeoffed, and confirmed, and by these presents *Doth* grant, enfeoff, and confirm, unto the said [*feoffee*], his heirs and assigns, ALL THAT, &c. *(parcels and general words): And* all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever, at law or in equity, of him the said [*feoffor*], of, in, to, or out of the same, and every part thereof: *And* also all deeds, evidences, and writings whatsoever relating to or concerning the same, now in the custody or possession of the said [*feoffor*], or which he can or may obtain without suit at law or in equity—TO HAVE AND TO HOLD the said close, piece, or parcel of land and hereditaments hereinbefore *granted and enfeoffed, or intended so to be, with the appurtenances, unto the said [*feoffee*], his heirs and assigns, TO THE ONLY PROPER USE of the said [*feoffee*], his heirs and assigns, for ever: *And* the said [*feoffor*], for himself and his heirs, the said close, piece, or parcel of land and hereditaments hereby granted and enfeoffed, or intended so to be, with the appurtenances, unto the said [*feoffee*], his heirs and assigns, will for ever warrant and defend against all persons whomsoever (*a*). IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

Conveying words.

All the estate, &c.

Deeds.

Habendum.

[*131]

General warranty.

Receipt to be indorsed.

RECEIVED on the day of the date of the within-written indenture, the sum of one hundred pounds, being the consideration or purchase-money within expressed to be paid to me. Witness my hand.

[*Vendor*].

Receipt indorsed.

(*a*) Sometimes the general warranty is created by way of covenant and grant, but the form here given corresponds with that in West's Symboliography, and the early books of authority.

SHORT FEOFFMENT, WITH GENERAL WARRANTY.

MEMORANDUM *of* LIVERY OF SEISIN *to be indorsed on the Deed.*

Memorandum of livery.

BE IT REMEMBERED, that, on the day of the date of the within-written indenture, full and peaceable possession and seisin of the close or piece or parcel of land therein comprised, with the appurtenances, was given and delivered by the within-named [*feoffor*], to the within-named [*feoffee*], in their proper persons, *To hold* the same unto and to the use of him the said feoffee, his heirs and assigns for ever, according to the tenor and effect of the same indenture, in the presence of us,

[*Witnesses.*]

[*Feoffor* and *Feoffee.*]

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FEOFFMENT BY A CORPORATION.

FEOFFMENT *by a Corporation, to the Use of the Vicar of* [M.], *and other Persons, upon the Trusts therein mentioned, in Consideration of the Tenants of the Manor of* [M.] *giving up certain Claims to the Corporation, as Lords of the Manor.*

THIS INDENTURE, of five parts, made &c., BETWEEN the mayor, burgesses, and commonalty of the city of ——, (lords of the manor of [M.], in the county of ——), of the first part; [*feoffee to uses*], of the second part; the Reverend [A. B.], clerk, vicar of the parish church of [M.], and [T. B.] and [J. H.], *(and various other persons)*, (tenants of the said manor of [M.]), of the third part; [*attornies to deliver seisin*], of &c., of the fourth part; and [*attornies to receive seisin*], of &c., of the fifth part. WHEREAS, in order to put an end to all disputes between the said mayor, burgesses, and commonalty, and the tenants of the said manor, including the tenants of four ancient tenements in [B.], in the parish of [M.], now subdivided into several

Recital of agreement between lords, and certain persons as tenants, of a manor.

small farms, the said mayor, burgesses, and commonalty, and the said several other parties, have come to the following agreement, namely, that the said tenants shall give up all claims upon the said mayor, burgesses, and commonalty, as lords of the said manor, for wood or underwood for the repair of their ancient houses, or for the repair of the foot-bridges over the brooks in the said manor and parish, or for any other purpose, and that, in consideration thereof, the said mayor, burgesses, and commonalty, shall convey the allotment of land hereinafter described to trustees for the purposes hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the release hereinafter contained, and also for and in consideration of the sum of ten shillings of lawful money *of Great Britain to the said mayor, burgesses, and commonalty paid by the said [*feoffee*], at or before the execution of these presents, the receipt whereof is hereby acknowledged, *They* the said mayor, burgesses, and commonalty, for themselves and their successors, *Have* granted, aliened, enfeoffed, and confirmed, and by these presents *Do* grant, alien, enfeoff (*a*), and confirm unto the said [*feoffee*], and his heirs, ALL THAT allotment or parcel of land awarded or allotted to the said mayor, burgesses, and commonalty, as lords of the said manor, lately part of the commons or waste grounds of the said manor, containing thirty-two acres, or thereabouts, (be the same more or less), abutting, &c. together with all appurtenances to the same belonging, (except and reserving out of these presents the parcel of ground set apart for the repair of the chancel of the said church, containing two acres or thereabouts), *And* the reversion and reversions, remainder and remainders, rents, issues, and profits of the said hereditaments hereby granted or expressed, or intended so to be: *And* all the

FEOFFMENT BY A CORPORATION.

Conveyance by the mayor, burgesses, and commonalty to feoffee, to uses.

[*133]

Parcels.

(*a*) The introduction of the word "enfeoff" seems to be a modern innovation, as the early feoffments contain only the words "*dedi, concessi, et confirmavi;*" but it is clear that no particular words are essential to the operation of the instrument. Any expressions that indicate the intention, will have the same effect.

FEOFFMENT BY A CORPORATION.

estate, right, title, interest, inheritance, use, trust, property, possession, benefit, claim, and demand whatsoever of them the said mayor, burgesses, and commonalty, of, in, to, or out of the same, or any part thereof. To HAVE AND TO HOLD the said lands, hereditaments, and premises, with their appurtenances, (except as hereinbefore is excepted), unto the said [*feoffee*] and his heirs, To THE USE and behoof of the said [*parties of the third part*], their heirs and assigns, for ever, *Upon trust* to apply five-sixth parts of the annual rents and profits of the said hereditaments towards the maintenance of the schoolmaster for the time being of the school of [M.] aforesaid, (the right of nominating whom shall be vested in the said mayor, burgesses, and commonalty, and their successors), in augmentation of such annual sum, not being less than eight pounds, as shall be bestowed towards his maintenance by the tenants for the time being of the said *manor, and the remaining sixth part of the said annual rents and profits in repairing the foot-bridges and wood-gates within the said manor and parish of [M.], and keeping them in good repair, and the school-house lately erected and built at [M.] aforesaid, for the residence of the schoolmaster for the time being of the said school. PROVIDED that when and so often as the number of acting trustees, having lands within the said parish, shall be reduced to the number of six, the remaining trustees shall elect such number of trustees as, with the number of the then acting trustees, will make up the original number of trustees, and shall signify such election to the said mayor, burgesses, and commonalty; and upon or immediately after their approbation thereof, the said lands hereby granted shall, with all convenient speed, be conveyed in such manner, and so as that the same shall and may be legally and effectually vested in the continuing trustees and such new trustees; or if there shall be no continuing trustee, then in such new trustees only, upon the trusts hereinbefore declared or expressed concerning the same; *provided* that the vicar for the said parish for the time being shall always be one of the trustees, for the purposes aforesaid. AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance of the said agreement in this behalf, and in consideration of the grant

Habendum.

To the use of the tenants, upon trust to maintain school and repair bridges.

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Power of appointing new trustees.

Further testatum.

hereinbefore made, the tenants of the said manor, parties hereto of the third part, for themselves severally, and their several heirs and assigns, *Have*, and each and every of them *Hath* remised, released, and quitted claim, and by these presents *Do*, and each and every of them *Doth* remise, release, and quit claim, unto the said mayor, burgesses, and commonalty, their successors and assigns, all claims and demands whatsoever which they the said tenants, or any of them, now have, or any of their heirs, executors, administrators, or assigns can or may, or otherwise might have or claim against the said mayor, burgesses, and commonalty, as lords of the manor of [M.] aforesaid, their successors or assigns, for an allowance of wood or underwood for the repair of their ancient houses within the said manor, or for the repair of the said foot-bridges over the brooks within the same manor, or for any other purpose whatsoever. AND the said tenants, parties hereto of the *third part, do hereby for themselves, severally and respectively, and for their several and respective heirs, executors, and administrators, covenant, promise, and agree to and with the said mayor, burgesses, and commonalty, their successors and assigns, that they the said tenants, parties hereto of the third part, their several heirs and assigns, and all other tenants of the said manor, shall and will from time to time, and at all times hereafter for ever, well and truly observe, perform, fulfil, and keep the said agreement in all respects, which, by them respectively, or on their respective parts, ought to be observed, performed, fulfilled, and kept, according to the true intent and meaning of these presents, and shall and will, from time to time and at all times hereafter, well and sufficiently save harmless and keep indemnified, the said mayor, burgesses, and commonalty, their successors and assigns, of, from, and against all such claims and demands as aforesaid, and all actions, suits, costs, charges, and expenses which may be sustained by reason thereof, or in relation thereto. *And* the said mayor, burgesses, and commonalty do hereby make, constitute, and appoint the said [*attornies to deliver seisin*] (*a*), jointly, and each

FEOFFMENT BY A CORPORATION.

Release by tenants of claims to wood, &c.

Covenant by tenants to observe the agreement hereinbefore made.

[*135]

Letter of attorney to deliver seisin.

(*a*) Infants, aliens, *femes covertes*, persons attainted, the husband for

Who may be at-

FEOFFMENT BY A CORPORATION.

of them severally, to be the true and lawful attornies and attorney of the said mayor, burgesses, and commonalty, for them, and in their names, to enter into and upon all and singular the said hereditaments and premises hereby granted and enfeoffed, or intended so to be, with the appurtenances, or into and upon some part of the same hereditaments and premises in the name of the whole; and

[*136] after the said [*attornies*], or either of them, shall have *entered into and upon the said hereditaments and premises in manner aforesaid, then, in the name of the said mayor, burgesses, and commonalty, to give and deliver unto the said [*feoffee*], in his own person, or by his attornies or attorney hereafter for that purpose authorized, seisin of all and singular the same hereditaments and premises, or some part thereof in the name of the whole, *To hold* unto the said [*feoffee*], his heirs, and assigns, for ever, To the several uses hereinbefore expressed and declared of and concerning the same; and the said [*feoffors*] hereby undertake to ratify and confirm whatsoever their said attornies, or either of them, shall lawfully do by virtue of these presents. And the said [*feoffee*] Doth hereby make, constitute, and appoint the said [*attornies to receive seisin*], jointly, and each of them severally, to be the true and lawful attornies or attorney of the said [*feoffee*], for him, and in his name, to enter into and upon the said hereditaments and premises hereby granted and enfeoffed, or intended so to be, or into and upon some part thereof in the name of the whole, and also in the name of the said [*feoffee*], and for him to take and receive seisin of all and singular the said hereditaments and premises from the said [*feof-*

Letter of attorney to receive seisin.

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tornies to deliver and receive seisin.

his wife, or the wife for her husband, may be attornies to deliver or receive seisin, being merely a ministerial act. (Co. Litt. 52. a.; Shepp. Touch. 211). Sir *Edward Coke* lays it down, that the attorney, where the feoffment is by indenture, must be a party to it, (Co. Litt. 52. b.), but the contrary has been repeatedly determined, *Moyl* v. *Ewer*, Cro. El. 905; *Dicker* v. *Nolan*, Hal. MSS. cit. Harg. & Butl. Co. Litt. 52. b. n. 4; and in the late case of *Doe* d. *Maddock* v. *Lynes*, 3 Barn. & Cress. 388; *S. C.* 5 D. & R. 160, where the attorney who delivered seisin was not a party to the indenture, no objection was taken on this ground. Of course it is not necessary to have two attornies either to deliver or receive seisin.

fors], in their own persons or by their attornies or attorney hereinbefore for that purpose authorized, *To hold* unto the said [*feoffee*], his heirs and assigns, for ever, To the several uses hereinbefore declared of and concerning the same: And the said [*feoffee*] hereby undertakes to ratify and confirm whatsoever his said attornies, or either of them, shall lawfully do by virtue of these presents. IN WITNESS, &c.

FEOFFMENT BY A CORPORATION.

BE IT REMEMBERED, that, on the —— day of ——, and year within written, the within-named [*attornies to deliver seisin, or one of them, as the case may be*], by virtue of the letter of attorney within contained in that behalf, did for the within-named [*feoffors*], and in their names, enter into and upon the within-mentioned piece or parcel of land, and take and have full and peaceable possession and seisin thereof; And afterwards the like full and peaceable possession and seisin thereof, for them the said [*feoffors*], and in their names, did deliver to the within-named [*attornies *to receive seisin, or one of them, as the case may be*], the attornies [*or* attorney] of the within-named [*feoffee*] within appointed in that behalf, *To hold* unto the said [*feoffee*], his heirs and assigns, for ever, to the uses, and according to the tenor, form, and effect of the within-written indenture, in the presence of us,

[*Witnesses*].

[*Attornies*].

Memorandum of livery of seisin by attorney.

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FEOFFMENT *of Lands belonging to a Charity, and Covenant to levy a Fine to the Use of the Feoffors, upon the Trusts of the Charity* (*a*).

FEOFFMENT TO CREATE DISSEISIN.

THIS INDENTURE, made the —— day of ——, &c. BETWEEN [*feoffors*], (*i. e. the trustees of the charity*), of &c., Recital of trusts, &c.

(*a*) In this instance the legal estate was outstanding in trustees, for the reason stated in the recital, and it being impossible to ascertain who was the last survivor, the present feoffment was executed, in order to acquire a tortious fee. See a remark on this, *supra*, p. 129.

FEOFFMENT TO CREATE DISSEISIN.

of the one part; and [*feoffee*], of &c., of the other part; (*Recite the instrument creating the original trust for the charity, and state the clause authorizing the election and appointment of new trustees in a certain manner by the survivors, when the number was reduced to four*). AND WHEREAS in pursuance of the power contained in the hereinbefore recited indenture of release, new trustees have from time to time been appointed, when and as often as the trustees of the said charity for the time being have been reduced to the number of four; and the said lands and hereditaments so limited in trust as aforesaid have from time to time been, or been intended to be, conveyed and assured unto and vested in such new trustees, in conjunction with the old and continuing trustees: AND WHEREAS by reason of an informality in the execution of one of the *indentures, whereby the said trust lands and hereditaments were intended to be limited and assured to the new trustees appointed as aforesaid, and the continuing trustees, it has been doubted whether the legal estate in the said hereditaments is not now outstanding in the legal representative of the last survivor of the granting parties to such instrument, and therefore the said [*feoffors*] are desirous of making a feoffment and levying a fine of the said messuages, lands, tenements, and hereditaments, and other the premises hereinbefore mentioned, *To the uses*, upon the trusts, and for the ends, intents, and purposes hereinafter declared. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of ten shillings of lawful money of Great Britain, to them the said [*feoffors*] paid at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, *They*, the said [*feoffors*], *have*, and each of them *hath* aliened, enfeoffed, and confirmed, and by these presents *Do*, and each of them *Doth*, alien, enfeoff, and confirm unto the said [*feoffee*] and his heirs, ALL and every the messuages, lands, tenements, and hereditaments hereinbefore described, and which were comprised in the hereinbefore recited indentures of lease and release, *And* all and every other the tenements and hereditaments comprised in the indentures, or either of them; Together with all and singular outhouses, buildings, yards, gardens, orchards, ways, paths, passages, waters, watercourses, tim-

Appointment from time to time of new trustees.

That legal estate is outstanding.

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Testatum.

Parcels.

General words.

ber ond other trees, woods, underwoods, and the ground and soil thereof, mines, quarries, commons, common of pasture and turbary, easements, privileges, liberties, advantages, emoluments, and appurtenances whatsoever, to the said messuages, lands, tenements, hereditaments, and premises hereinbefore described, and hereby enfeoffed, or expressed and intended so to be, or any of them, or any part or parcel thereof, belonging, or in anywise appertaining, or therewith or with any part or parcel thereof, held, used, occupied, possessed, or enjoyed, or accepted, reputed, deemed, taken, or known, as part, parcel, or member thereof, or of any part thereof, or in anywise incident, appendant, or appurtenant thereto; *And* the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the same messuages, lands, *tenements, hereditaments, and premises, and of every [*139] part and parcel thereof; *And* all the estate, right, title, trust, interest, property, possession, inheritance, claim, and demand whatsoever, as well legal as equitable, of each and every of them the said [*feoffors*], of, in, to, or out of the same messuages, lands, tenements, hereditaments, and premises, and every part and parcel thereof; To HAVE AND TO HOLD the said messuages, lands, tenements, and hereditaments, and other the premises hereby enfeoffed, or intended so to be, with the appurtenances, unto the [*feoffee*] and his heirs, for ever, To THE USE and behoof of the said [*feoffors*], their heirs and assigns, for ever: *But nevertheless* upon the trusts, and to and for the intents and purposes thereof declared in and by the said hereinbefore recited indenture of release, so far as the same trusts are subsisting or capable of taking effect; *And* to, for, or upon no other use, trust, intent, or purpose whatsoever. AND all the said parties to these presents do hereby direct and declare (*a*)

FEOFFMENT TO CREATE DISSEISIN

Habendum.

To the use of feoffors in fee.

Declaration that feoffment is intended to create a disseisin.

(*a*) It is not only not necessary to the validity of a feoffment to effect a disseisin, or of a fine with proclamations to operate as a bar by non-claim, that these purposes should be declared upon the face of the deed, but such a disclosure is in general indiscreet. In the present instance, perhaps, there may be no very strong objection to an avowal of the purpose for which the feoffment and fine are executed and levied, but some gentlemen are in the habit of adopting the same course, where the object of

Remark on such declaration.

FEOFFMENT TO CREATE DISSEISIN.

that the feoffment hereby made, or intended so to be, shall operate and enure by way of disseisin of all estates, if any, in the said messuages, lands, tenements, and hereditaments, and other the premises hereby enfeoffed, or intended so to be, with the appurtenances, which are in any person or persons whomsoever, other than the said [*feoffors*]; AND each and every of them the said [*feoffors*], severally, separate and apart from the others of them, and as to and concerning the acts, deeds, and defaults of himself only, doth hereby for himself respectively, and his re-

Covenant to levy a fine.

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the feoffment and fine is to fortify the title of a purchaser. Such a practice, however, is objectionable, as it perpetuates the record of the defect, and renders it impossible that the feoffment and fine should ever form an unexceptionable root of the title. Indeed, where practicable, it is much better that the property should be so limited as that a distinct purpose should exist, for which a fine is requisite, and which would render the real purpose of the feoffment and fine not suspected, when the defect which has given rise to them shall be, from the lapse of time, buried in the anterior and undisclosed part of the title. Thus, where it is intended, pending a sale, that the title of the purchaser shall be strengthened by a feoffment and fine, and he is a married man, it seems for this reason advisable that the vendor should by feoffment simply convey the lands to the vendee in fee, (*ut supra*, p. 130), and then that the vendee *and his wife* should subsequently, by a separate deed, covenant to levy a fine to uses in favour of the husband to prevent dower, (for which *vide supra*, Vol. I. p. 653, Vol. III. p. 553), the return of the writ of entry on the fine being subsequent to the livery of seisin and feoffment. By this means the suspicious appearance of the transaction would be in some measure avoided, and the fine appearing to be levied for the mere purpose of extinguishing the dower of the wife, might form an unexceptionable commencement of, or link in the title. In such a case, it is better that the deed to lead the uses of the fine should contain no recital, (*vide infra*), for though it may be desirable not to disclose the whole purpose for which the fine is levied, yet it is by no means necessary, and is improper, to introduce a recital *mis-stating* the purpose. Where a termor chooses (in spite of the recommendation before urged), to acquire a tortious fee, he should simply make a feoffment for a nominal consideration, without any recitals, and covenant to levy a fine to the uses intended. The form before given (*supra*, p. 130), except as to the consideration (which should be nominal), and general warranty (which should be omitted), may serve as a precedent for such a feoffment.

FEOFFMENT TO CREATE DISSEISIN.

spective heirs, executors, and administrators, covenant and agree with the said [*feoffee*], his heirs, and assigns, that they the said [*feoffors*] shall and will at their own proper costs and charges, in or as of Easter Term now next ensuing, or in or as of some other subsequent Term, acknowledge and levy unto the said [*feoffee*], and his heirs, before his Majesty's Justices of the Court of Common Pleas at Westminster, one or more fine or fines *sur cognizance de droit come ceo*, &c. with proclamations to be thereupon had and made according to the form of the statutes in that case made and provided, and the usual course of fines in such cases used, of the said messuages, lands, tenements, and hereditaments, and other the premises hereby enfeoffed, or intended so to be, with the appurtenances, by such apt, proper, and convenient names, *number of messuages, and acres, quantities, qualities, and [*141] other descriptions, as shall be sufficient to comprise the same; as by the said [*feoffee*], his heirs, or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required. And it is hereby declared and agreed by and between all the said parties to these presents, so far as they are respectively interested in the premises, and they hereby severally and respectively direct and appoint that the fine or fines to be so as aforesaid, or in any other manner, or at any other time or times acknowledged and levied, and all and every other fines or fine, conveyances and assurances, of the said messuages, lands, tenements, and hereditaments, and other the premises hereby enfeoffed, or intended so to be, or any part or parcel of the same, by or between the said parties to these presents, or any of them, or whereunto they, any, or either of them are or is, or shall or may be party or privy, parties or privies, shall operate and enure, To the uses, upon the trusts, and to and for the intents and purposes hereinbefore limited, expressed, and declared, of and concerning the same, in confirmation of these presents, and for the purpose of giving more full and complete effect to the same. And all the said parties to these presents do hereby further direct and declare, that the fine or fines so to be levied as aforesaid, is and are intended to be levied, and shall operate and enure by way of bar under the statutes of non-claim to all estates, if any, in the said mes-

Declaration of uses of intended fine.

Declaration that fine is intended to operate as a bar by non-claim.

FEOFFMENT TO CREATE DISSEISIN.

suages, lands, tenements, and hereditaments, and other the premises hereby enfeoffed, or intended so to be, with the appurtenances which are in any person or persons whomsoever, other than the said [*feoffors*], or some or one of them, upon the trusts, and for the intents and purposes hereinbefore declared concerning the same. IN WITNESS, &c.

To be indorsed on the Feoffment.

Memorandum of livery, with the assent of lessee.

BE IT REMEMBERED, that, on the day and year first within written, *(or any other day, as the case may be)*, the within-named [*feoffors*] did enter upon and take possession of the messuages, lands, tenements, and hereditaments, described in the within-written indenture, and thereby *enfeoffed or intended so to be, (with the assent of [*lessee or lessees*], the lessee [*or* lessees] for years in possession thereof, whose name [*or* respective names] is [*or* are] hereunto subscribed, without prejudice to his [*or* their] term [*or* respective terms]), and claimed the same as their inheritance; and having taken possession and seisin thereof as aforesaid, did make livery of seisin of the same messuages, lands, tenements, and hereditaments, and other the premises to the within-named [*feoffee*] (*a*), *To have and to hold* to the said [*feoffee*], and his heirs, for ever, To the uses, and according to the form and effect, and true intent and meaning of the within-written indenture.

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[*Witnesses*] (*b*).

[*Feoffors*, and *Feoffee*].

(*a*) Where part of the lands is in the occupation of one tenant, and part of another (*vide sup.* p. 116), add these words:

Separate seisin for distinct parts.

"(A separate seisin having been delivered of the lands in the tenure or occupation of [*one tenant*], and of the lands in the tenure or occupation of [*the other tenant*])."

Lessee should subscribe memorandum.

(*b*) Where the lands are in the occupation of tenants, whether holding by lease or tenancy from year to year, it seems to be a prudent precaution to make them subscribe the memorandum of livery, in order to prevent any question as to their assent having been obtained. (*Vide sup.* p. 115).

It seems to have been usual, where feoffments were executed with a view to create a disseisin, to make the feoffor and feoffee personally deliver and receive seisin; but this is, of course, not essential to their efficacy (if indeed the late determinations have left them any efficacy,) in this respect

FINES.

I. As to the nature and operation of fines.
II. As to the form and manner of levying fines.
III. As to the deed leading or declaring the uses of fines.

NATURE AND SEVERAL SORTS OF FINES.

I. A fine is an assurance upon record, being the termination by agreement, with the king's license, of a fictitious real action, and has all the solemnity and presumed notoriety of a judicial proceeding.

Fine *sur conuzance de droit come ceo*, &c.

There are four species of fines: 1*st*, A fine *sur conuzance de droit come ceo qu'il a de son done*, which supposes a prior feoffment or gift, and is the proper and ordinary fine for conveying estates of inheritance in possession or reversion; and the fee will pass by it without words of limitation, Co. Litt. 9. b., though its operation may be confined to a less estate by express words, (see *Hunt* v. *Bourne*, 1 Salk. 240), or, it seems, by the deed declaring the uses. *Davies* v. *Bush*, 1 M'Clel. & Younge, 51. This fine, if levied by a tenant for life, without being restricted to his estate, occasions a forfeiture, and divests the remainders, giving a right of entry to the real remainder-man. *Buckler's case*, 2 Rep. 55; see also *Focus* v. *Salisbury*, Hard. 401. The forfeiture, however, arises in some cases in which the remainders are not divested, as where the reversion is in the Crown, or the subject be an advowson or other thing lying in grant, Co. Litt. 251. b., or the tenant for life accept a fine *sur come ceo*, *&c*. *Smithe* v. *Abell*, 2 Lev. 202.

Fine *sur conuzance de droit tantum.*

2*ndly*, Fines *sur conuzance de droit tantum* acknowledge the right only, and not a previous feoffment, and are therefore proper to pass reversionary interests. They also confer a fee without words of limitation, 1 Co. Litt. 9. b., but are now unfrequently resorted to, being greatly superseded by—

Fine *sur concessit.*

3*rdly*, Fines *sur concessit*. This fine will convey an estate in fee, *Ludlow* and *Drummond*, 2 Taunt. 84, in tail, for life, or for years, but must express some certain estate; and therefore the Court refused to permit a fine, in general terms, of all the conusor's estate in the premises to pass. *Seymour* v. *Barker*, 2 Taunt. 198. Where levied by a tenant for *life, or for years, it does not produce forfeiture, its operation being simply to pass the conusor's interest; *Pigott* d. *Lee* v. The Earl of *Salisbury*,

FINES CONSIDERED AS A CONVEYANCE BY MARRIED WOMEN.

2 Mod. 109; and is therefore frequently used to convey a limited or reversionary interest; and also where the object is to bind, without extinguishing, a right or contingent interest. *Lethieulier* v. *Tracy*, 3 Atk. 728. It is no objection to such fine in point of form, that it professes to pass both an estate for life, and a contingent remainder in fee. *Prideaux* v. *Gifford*, 6 Taunt. 21.

Fine *sur done grant et render.*

4*thly*, A fine *sur done grant et render* is a double fine comprising both the fine *sur conuzance de droit come ceo, &c.* and the fine *sur concessit; Price* v. *Langford*, 1 Salk. 337; but, as it is obsolete in practice, the reader is referred to the Treatises on fines for the learning respecting it. Wilson, 39. Cruise on Fines, 65. See also 1 Prest. Conv. 211.

The purposes for which fines are levied at this day, are principally the following:

Purposes for which fines are levied.

1*st*, To convey the estates or extinguish the rights of married women.

2*ndly*, To bar estates tail.

3*rdly*, To confer a title by non-claim.

Fines by married women.

1*st*, *As to fines by married women.* Where a legal or equitable estate or interest is vested in a married woman, (unless it be limited to her separate use, or with a power of disposition as a feme sole), an effectual title to her interest can only be made by means of a fine or common recovery, which, being feigned actions, are attended with the same consequences as real adverse suits, and by this means bind the interest of the wife. See Harg. & Butl. Co. Litt. 121, n.

Concurrence of the husband.

Both the husband and wife, whether the inheritance be in her or in him, should properly be parties to the fine; though a fine levied by the wife alone, *as a feme sole*, will be good against her and her heirs, unless avoided by the husband, during the coverture. Co. Litt. 46. a.; Earl of *Bedford's case*, 7 Rep. 8; *Mary Partington's case*, 10 Rep. 43 a; and see Willes, 160. Where a fine is levied by a married woman without the concurrence of her husband, (which of course should only be done in case of necessity), care should be taken not to disclose the coverture on the record, as the fine in that case will be void. The Court will not interfere to authenticate a fine levied by a married woman without her husband, under *any* circumstances, but will leave the parties to act as they may be advised; and the validity of the fine will depend upon the husband exercising his right to avoid it or not. *Stead* v. *Izard*, 1 New Rep. 312; *Ex parte Abney*, 1 Taunt. 37; *Ex parte St. George*, 2 J. B. Moore, 652.

Custom of London, &c.

By the custom of London and some other cities and corporate towns, married women may alien their lands by deed enrolled, being separately examined before the Lord Mayor, (*vide ante*, Vol. I. p. 3); and this right is saved to them by stat. 34 & 35 Hen. 8, c. 22, but in London it

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*is not often resorted to in practice. Here it may be noticed, that a fine levied by an infant can only be avoided during his minority, and upon

FINES CONSIDERED AS A BAR TO ESTATES TAIL.

inspection; 2 Roll. Abr. 15; Id. 35; *Hutchinson's case*, 3 Lev. 36; *Ann Hungate's case*, 12 Rep. 122; *Warcombe* and *Carroll's case*, Ib. 125; *Perrott's case*, 2 Vent. 30; unless his infancy has been previously recorded, *Keckwich's case*, Moore, 844; see also *Griffith's case*, 12 Mod. 444; Co. Litt. 380. b. And a fine by an idiot, it seems, cannot be avoided. *Mansfield's case*, 12 Rep. 124.

Fines by infants, idiots, &c.

The Court will punish commissioners who take the acknowledgments of persons who are palpably infants, idiots, or lunatics. *Cavendish* v. *Worsley*, cit. 12 Rep. 133; *Petty's case*, 1 Freem. 78; and see *Perrott's case*, 2 Vent. 30. In a late case, the Court amended a recovery, by striking out the name of an infant vouchee, whose acknowledgment had been taken by mistake. *Cheesman* dem., 7 Taunt. 697.

As to fines by tenants in tail.

Secondly.—*Fines levied by tenants in tail* derive their efficacy as a bar to the issue, from the statutes 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36.

Fines in Common Pleas to be proclaimed.

By stat. 4 Hen. 7, c. 24, it is enacted, that after the engrossing of every fine to be levied after the feast of Easter, that shall be in the year of our Lord 1490, in the King's Court, afore his justices of the Common Place, of any lands, tenements, or any other hereditaments, the same fine be openly and solemnly read and proclaimed in the same Court the same term, and in three terms then next following the same engrossing, in the same Court, at four several days in every term; and in the same time that it is so read and proclaimed, all pleas do cease. And the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers to the same, *except* women covert, (other than been parties to the said fine), and every person then being within age of twenty-one years, in prison, or out of this realm, or not of whole mind at the time of the said fine levied, not parties to such fine. And saving to every person or persons, and to their heirs, other than the parties in the said fine, such right, title, claim, and interest as they have to or in the said lands, tenements, or other hereditaments, at the time of such fine engrossed; *so that they pursue their title, claim, or interest by way of action or lawful entry* (*a*), *within five years next after the said proclamations had and made.* And also, saving to all other persons such action, right, title, claim and interest in or to the said lands, tenements, or other hereditaments, as first shall grow, remain, or descend, or come to them after the said fine engrossed, and proclamation made by force of any gift in the tail, or by any other cause or matter had and made before the said fine levied; *so that they take their action, or pursue their said right and title accordiug to the law, within five years next after such action, right, title, claim or interest to them accrued, descended, remained, fallen, or come;* and that the said persons, and their heirs may have their said action against

Such fine to conclude all persons except persons under disability;

Unless they claim within five years after proclamations made;

Or after the right accrued.

(*a*) As to the form of an entry to avoid a fine, *vide post*, p. 185.

FINES CONSIDERED AS A BAR TO ESTATES TAIL.

the pernor of the profits of the said lands and tenements, and other hereditaments, at the time of the said action to be taken. And, if the same persons at the time of such action, right, and title accrued, descended, remained, or come unto them, be *covert de baron*, or within age, in prison, or out of this land, or not of whole mind, then it is ordained "that their action, right, and title be reserved and saved to them and their heirs, unto the time they come and be at their full age of twenty-one years, out of prison, within this land, uncovert, and of whole mind; *So that they or their heirs take their said actions, or their lawful entry, according to their right and title, within five years next after that they come and be at their full age, out of prison, within this land, uncovert, and of whole mind,* and the same actions pursue, or other lawful entry take, according to the law." And also, "that all such persons as be *covert de baron*, not party to the fine, and every person being within age of twenty-one years, in prison, or out of this land, or not of whole mind at the time of the said fines levied and engrossed, and by this said act afore except, having any right or title, or cause of action to any of the said lands and other hereditaments, that they, or their heirs inheritable to the same, take their said actions or lawful entry according to their right and title, *within five years next after they come and be of age of twenty-one years, out of prison, uncovert, within this land, and of whole mind,* and the same actions sue, or their lawful entry take and pursue, according to the law. And if they do not take their actions and entry as is aforesaid, that they and every of them, and their heirs, and the heirs of every of them, be concluded by the said fines for ever, in like form as they be that be parties or privies to the said fines: Saving to every person or persons not party nor privy to the said fine, their exception to avoid the same fine by that, that those which were parties to the fine, nor any of them, nor no person or persons to their use, ne to the use of any of them, had nothing in the lands and tenements comprised in the said fine at the time of the said fine levied." And "that every fine that hereafter shall be levied in any of the King's Courts, of any manors, lands, tenements, and other possessions, after the manner, use, and form that fines have been levied afore the making of this act, be of like force, effect, and authority as fines so levied be or were afore the making of this act, this act or any other act in this present Parliament, made or to be made, notwithstanding. And every person shall be at liberty to levy any fine hereafter at his pleasure, whether he will, after the form contained and ordained in and by this act, or after the manner and form aforetime used."

Persons under disabilities to have five years after their removal.

Other fines to have the same force as heretofore.

Stat. 32 Hen. 8, c. 36.

A doubt having arisen, whether this statute operated as a bar to the issue of tenant in tail (see Harg. & Butl. Co. Litt. 121, n.) the stat. 32 Hen. 8, c. 36, was passed, which, after reciting the former statute, and this question raised upon the construction of it, enacts, "that all and singular fines as well heretofore levied, as hereafter to be levied, before the

said justices, with proclamations, according to the said statute, by any person or persons of full age of one-and-twenty years, of any manors, lands, tenements, or hereditaments, before the time of the said fine levied, in anywise entailed to the person or persons so levying the same fine, or to any the ancestor or ancestors of the same person or persons *in possession, reversion, remainder, or in use*, shall be, *immediately after the same fine levied, engrossed, and proclamations made*, adjudged, accepted, deemed, and taken, to all intents and purposes, a sufficient bar and discharge for ever *against the said person and persons, and their heirs claiming the same lands, tenements, and hereditaments, or any parcel thereof, only by force of any such intail; and against all other persons claiming the same, or any parcel thereof, only to their use, or to the use of any manner of heir of the bodies of them;* any ambiguity, doubt, or contrariosity of opinion risen or grown upon the said statute to the contrary notwithstanding."

FINES CONSIDERED AS A BAR TO ESTATES TAIL.

Sect. 2, provides that the act shall not extend to fines levied by any woman, after the death of her husband, contrary to stat. 11 Hen. 7, c. 20, (which restrains fines levied by women of lands of which they are seised by the gift of their husband, or any of his ancestors, either for life or in tail, either solely or jointly with him). By sect. 3, the act is not to extend to alienations restrained by any act since 4 Hen. 7; nor, by sect. 4, to fines actually levied, nor to lands granted by letters patent or act of Parliament, *the reversion whereof is in the Crown.*

Act not to interfere with stat. 11 Hen. 7, c. 20.

Exception where reversion is in the crown.

Under these statutes, it is clear that a fine *with proclamations* by a tenant in tail is a complete bar to the issue, in respect of all interests, legal or equitable, present or future; *Grant's case*, cit. 10 Rep. 50 a; *S. C. nom. Johnson* v. *Bellamy*, Cro. El. 122; *S. C.* 2 Leon. 36; and is not prevented from effect by the estate tail having been previously discontinued, *Hunt* v. *King*, Cro. El. 610, (for the plea of *partes finis*, &c., is not allowed to issue in tail).

Fine, a bar to issue in tail, when.

And such a fine will operate against all the issue inheritable under the intail, whether lineal or collateral to the conusor. Thus, where an estate tail descended from the tenant in tail to his eldest son, it was held that the fine of the latter barred not only his own issue, but also his younger brother, and the issue of such brother. *Stamford's case*, 2 Leon. 66; see also *Stevens* d. *Costard* v. *Winning*, 2 Wils. 219. And a fine levied by the issue in tail, in the lifetime of the ancestor, will bar all the issue inheritable under the intail, provided the estate tail afterwards descend upon him or any of his issue; but, if he subsequently die without issue, or such issue die in the lifetime of the ancestor *without issue*, the fine will be inoperative against the collateral issue, (*i. e.* his brothers and their issue), who claim not through *him, but immediately from their common ancestor. *Bradstock* v. *Scorell*, Cro. Car. 454; *S. C.* cit. Pollex. 61; see also *Mackwilliam's case*, Hob. 33. It seems, therefore, to have been thought that the statute (the words of which are very general) prevented any

As to fines by issue in the lifetime of the ancestor.

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person from claiming as issue in tail, in opposition to the fine of his ancestor, even though he had no estate at the time of levying it; and consequently, if such person, or his issue, who derived their title through him, afterwards became entitled, the intail was barred. This construction of the statute seems not to be so unreasonable as has been sometimes contended, see Atherl. Shepp. Touchst. 26), and, it is conceived, is not inconsistent with saying, that the fine shall have no operation if the conusor subsequently dies, under circumstances which throw him altogether out of the line of descent, "so that a younger brother shall never mention him in a *formedon en le descender*." Cro. Car. 435. The distinction, too, seems to be supported by the analogous case put by Judge *Berkeley*, Cro. Car. 435, that where a father in the life-time of the grandfather is attainted of felony, and has issue a son and dies, and then the grandfather dies, the land shall escheat, "for the son ought to make his descent by the father, which cannot be."

Fine with proclamations does not bar reversions and remainders.

But as the operation of a fine with proclamations, by virtue of the statutes in question, is confined to the issue, and does not extend to the reversioner or remainder-man, such a fine confers an absolute title to the fee, only where the tenant in tail has the reversion or remainder in fee immediately expectant on the estate tail; but, even in this case a common recovery is the preferable assurance for a purchaser, inasmuch as the fine lets in the incumbrances, (if any), affecting the reversion; *Kynaston* v. *Clarke*, 2 Atk. 202; whereas, in the case of a recovery, the fee being derived wholly from the estate tail, excludes such incumbrances. See *Cave* v. *Holford*, 3 Ves. 675. But it is settled, that a purchaser cannot insist upon a recovery, if the title to the reversion be free from objection; *Sperling* v. *Trevor*, 7 Ves. 497; and as a recovery can only be suffered in term time, and where the tenant in tail has, or can obtain, the concurrence of the person who has the immediate freehold, it is evident that resort may sometimes be had to a fine, to obtain a title to the fee, where a recovery is not practicable. Where, however, the title to the reversion in fee is long and intricate, the difference of expense between a fine and recovery will be more than compensated on a re-sale, by founding the title on the estate tail alone; and a purchaser, therefore, is frequently advised to suffer a recovery at his own expense.

As to non-claim.

Thirdly.—Another operation of the statute of 4 Hen. 7, c. 24, is to confer a title by *non-claim*. On this subject several particulars are to be observed; 1. That the fine must be levied with proclamations. 2. That the parties to the fine, or some of them, must have an estate of freehold; and, therefore, a fine levied by tenant for years in *possession is void. *Focus* v. *Salisbury*, Hard. 401; *Smith* d. *Dormer* v. *Parkhurst*, 3 Atk. 135; 18 Vin. Ab. 135; 6 B. P. C. Toml. edit. 351; Willes, 327, *S. C.*

Fine must be with proclamations.

Parties must have the freehold.

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What amounts to a seisin, so as

There is so much discrepancy between the early and later authorities, in regard to the doctrine of disseisin, that it seems to be difficult, at this

day, to say what in many cases would judicially be held to amount to a seisin, to give effect to a fine by non-claim. One of these questions has already been discussed at large, *vide supra*, p. 117, *et seq.*

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to give effect to a fine by non-claim.

A few other points, however, should be noticed. In *Doe* d. *Osborn* v. *Spencer*, 11 East, 495, it was held, that proof of the execution of a writ of possession, and of receipt of rent, were sufficient evidence of seisin to support a fine. And see *Doe* d. *Foster* v. *Williams*, Cowp. 621. And in several early cases it has been adjudged, that where a person enters, claiming the freehold under a deed or will, which turns out to be void, the rightful owner is disseised; *Croft* v. *Howell*, Plowd. 530; Duke of *Northumberland's case*, 1 Leon. 21; see also *Tapner* d. *Peckham* v. *Merlott*, Willes, 177; and, therefore, a fine levied by such persons will operate by non-claim.

Entry under legal process, and claiming the freehold.

Entry under void deed or will.

So, it has been held that a fine levied by an heir-at-law, who entered upon lands devised by his ancestor, might operate by non-claim against the devisee. *Hulm* v. *Heylock*, Cro. Car. 200. In such cases, however, it has been usual in practice first to make a feoffment, in order more certainly to acquire a tortious fee, though we have seen that at this day even this expedient is not completely to be relied on. *Vide supra*, p. 121.

In the late case of *Doe* d. *Souter* v. *Hall*, 2 Dowl. & Ryl. 38, it was held, that where A., tenant for life, conveyed by bargain and sale to B., who entered and retained possession until his death, when the possession devolved upon his devisees in trust for sale, this was no disseisin of the reversioner, (whose title, it may be inferred, though it is not expressly stated, had accrued by the death of A. in the lifetime of B.); the Court being of opinion that the persons in possession were merely tenants by sufferance to the reversioner, and that, therefore, the latter had a devisable interest in the lands, and not a right of entry only, as had been contended. Mr. Justice *Bayley* considered that the case fell within Lord *Coke's* definition of a tenant by sufferance, *viz.* "he who originally comes in by right, but continues in possession by wrong." See Co. Litt. 271. a., (and not 240. b., as cited).

Persons holding over after the determination of their interest, decided to be tenants by sufferance.

It should be observed, however, that, in the text, in connection with which this definition is found, the case referred to is one "where a man of his own head occupieth lands or tenements at the will of him which hath the freehold, *and such occupier claimeth nothing but at will.*" See also *Rous* and *Artois' case*, 2 Leon. 47. The non-assertion of ownership, therefore, was evidently considered as a necessary ingredient in a *tenancy by sufferance; and this reconciles the position in question with Lord *Coke's* definition in another place of a deforcer, whom he states to be "any man that holdeth land whereunto another man hath right. Co. Litt. 277. b.; and see Lord *Mansfield's* judgment in *Doe* d. *Fishar* v. *Prosser*, Cowp. 218. Now, it can hardly be contended, that where a person enters under a deed professing to convey the fee, (for such, we may *infer*

Strictures upon *Doe* v. *Hall*.

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was the case here), and retaining possession until his death, when his devisees in trust take possession, and levy a fine of the land, these are persons who claim "nothing but at will." Such conduct is surely more consistent with an assertion than a denial of title. And though a fine levied by a person in possession does not, as a feoffment, *per se* create a tortious freehold, yet where the possession is of a doubtful nature, it may serve to determine its character, by shewing that it was accompanied by an assertion of right.

Person holding over considered as tenant by sufferance.

In another recent case, it was held, that, where a tenant for life leased land for her own life, and the lessee held over after the death of the tenant for life without paying rent, until his own death, when his son took possession and levied a fine with proclamations, the fine could not operate by non-claim, there being no disseisin; though it was strongly contended, that, admitting the father to be tenant by sufferance, yet that the son, who entered wrongfully, could not be deemed such, and therefore an actual entry was not necessary to avoid the fine. *Doe* d. *Burrell* v. *Perkins*, 3 Mau. & Selw. 271; see also *Jerritt* v. *Weare*, 3 Pri. 575. These cases illustrate the observation before made as to the disinclination of the Courts at the present day to the admission of any species of disseisin, where the consequence is to work moral injustice, and particularly in cases in which the party originally entered by a good title.

The reader is recommended to peruse Mr. Preston's Observations on Disseisin in his Treatise on Abstracts, Vol. 2, p. 279; but it should be noticed that they are founded almost exclusively on the early cases, without regard to the effect of the more recent adjudications. However untenable some of the points in the modern cases may be upon principle, yet it is not to be forgotten that they express the sentiments of those, who, when questions of this nature are judicially agitated, are armed with the authority to determine them.

Disseisin in regard to tenants in common.

In regard to tenants in common, (and the rule of course applies to joint-tenants), it seems, that as the possession of one is the possession of his companion, the mere receipt of the whole rent by such one does not constitute a possession adverse to the other, unless accompanied by an actual denial of his title; *Peaceable* d. *Hornblower* v. *Read*, 1 East, 568; see T. Raym. 371; but where one tenant in common has been in possession for a long period, without any claim by his companion, an ouster has sometimes been presumed. *Story* v. Lord *Windsor*, 2 Atk. 632; **Doe* d. *Fishar* v. *Prosser*, Cowp. 217; but see *Fairclaim* d. *Empson* v. *Shackleton*, 5 Burr. 2604.

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Estate must be divested and turned to a right.

3*dly*, That the estate against which the fine is to operate, must be divested and turned to a right, (*i. e.* a right of entry). *Margaret Podger's case*, 9 Rep. 106; see also Hard. 415; but see *William* d. *Hughes* v. *Thomas*, 12 East, 141; which, however, compare with *Hughes* v. *Thomas*, 13 East, 474. Thus, a fine levied by a tenant for life or in tail, *in re-*

mader, willbein operative both against the precedent and subsequent estates, there being no adverse possession, for the seisin of the tenant for life in possession, (who remains undisturbed), is the seisin of all those entitled in remainder. *Rowe* v. *Power*, 2 New Rep. 1; *Doe* d. *James* v. *Harris*, 5 Mau. & Selw. 326 (*a*); see also *Roe* d. *Truscott* v. *Elliot*, 1 B. & A. 85; *Carhampton* v. *Carhampton*, Irish Term Rep. 569. And a fine by one tenant in common in fee in remainder, was lately held to have no effect by non-claim against his companion. *Doe* d. *Truscott* v. *Elliot*, 1 B. & A. 85.

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It follows from the principle which requires adverse possession to give effect to non-claim on a fine, that future interests, on which no right of entry has accrued, are not bound; *Edwards* v. *Slater*, Hard. 410; *Corbett* v. *Stone*, T. Raym. 140; nor are collateral rights and interests bound, against which there is not, strictly speaking, any adverse possession, as fee-farm rents, common of pasture, judgments; *Stowel's case*, cit. 5 Rep. 124 a; *Goodright* d. *Hare* v. *Board*, Cruise on Fines, 249; see also 1 Ch. Cas. 268; powers simply collateral, &c. 1 Roll. Rep. 197; Co. Litt. 265. b. But creditors who have sued out an *elegit*, are bound; *Ognell* v. *Arlington*, 1 Mod. 217; unless there be a prior unsatisfied extent, in which case the second creditor has five years from the period at which such prior extent is satisfied. See *Dighton* v. *Grenvil*, 2 Vent. 333; 1 Show. 36; 1 Skinn. 260. If a person entitled to the benefit of *a judgment joins in the fine, that interest of course will pass. *Goodrich* v. *Shotbolt*, Pre. Ch. 335.

Future interests not barred.

As to rents, judgments, &c.

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Upon the principle under consideration, too, it seems to be evident, (though the point has lately been referred to as doubtful by one writer, Covent. Watk. Princ. Conv. 318, n.; and see *Romilly* v. *James*, 6 Taunt. 263, and has been treated as clear the other way by another, Atherl. Shepp. Touchst. 37, n.), that a fine levied by the owner of a fee, liable to be defeated by an executory or springing limitation, will not bar or dis-

Whether executory limitation can be barred by non-claim on a fine.

(*a*) In this case, Mr. Justice *Bayley* is made to treat a fine levied by a tenant in tail *in remainder* as void, except by way of estoppel, but clearly such a fine may operate as a conveyance in such a case, *i. e.* as conferring a base fee in remainder. Probably, the learned Judge's attention was directed to the case of a discontinuance, which can only be produced by the fine of a tenant in tail *in possession*. A writer before adverted to has, with similar inaccuracy, treated a fine without proclamations as absolutely void; Atherl. Shepp. Touchst. 34, n.; meaning probably (though the terms are quite general,) to refer to such fines as a bar to the issue in tail, or as operating by non-claim, for which purposes alone such fines are void. Positions of this nature, unfortunately, are calculated to mislead and perplex students.

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turb such limitation, *Lloyd* v. *Carew*, Show. 137, interests of this nature being possibilities only, and conferring no immediate right of entry. See 1 Ves. Sen. 391. Indeed, as the first taker has already the entire fee-simple in him, though liable to be divested, it seems that no assurance by him can have any operation beyond that of passing such fee-simple. A contrary doctrine would seem to involve a denial of the necessity in *any* case, that a fine should have a divesting operation, in order to its taking effect by non-claim. Undoubtedly, if the question were *res integra*, there might be ground to contend that the terms of the statute being general, that "every fine," &c. levied with proclamations, should be a bar, it was sufficient for all the purposes of the statute, that the parties to the fine had an estate of freehold to support it against the plea *ut partes finis nihil habuerunt*, particularly as, in providing for a future right of entry accruing to a party against whom the fine was intended to operate, the Legislature evinced that a fine *might* be levied under circumstances which would not give such person an immediate right of entry by forfeiture. The early authorities, however, which have been too often recognised now to be shaken without great danger, have decided that an adverse possession *is* necessary, except in a few particular instances, which may be regarded as exceptions, (*vide supra*); and therefore, it is conceived, have conclusively established that a fine levied by the owner of a defeasible fee, has no operation by non-claim on the executory interest limited thereon. Where the fine is levied subsequently to the event on which such interest is to arise, (in which case the interest is no longer executory), the possession is immediately adverse, and the fine therefore becomes a bar. Mayor of *London* v. *Alsford*, Cro. Car. 575; *Thomasin* v. *Mackworth*, Cart. 75; see also *Saffyn's case*, 5 Rep. 124; *S. C.* Cro. Jac. 60; and see an analogous distinction in regard to equitable charges, taken in *Wakelyn* v. *Warner*, 2 Ch. Cas. 247. (In 1 Eq. Ca. Ab. 256, pl. 1, this case is inaccurately stated as an authority for the opposit doctrine). It should be remembered, however, that the Courts have lately inclined to consider persons holding over after their interests are determined as tenants by sufferance, even under circumstances in which their conduct might seem to imply an assertion of title, and consequently to be inconsistent, according to the early doctrine at least,

[*153] *with this tenancy. In a publication before alluded to, it is suggested, that, in the case of a fine levied by the owner of a defeasible fee, the fine would not begin to operate until the person entitled under the executory limitation had entered, or claimed to put an end to the tenancy by sufferance. Coventry's Watk. Princ. Convey. 319. But it is to be observed, that this tenancy is determined as well by any act of the tenant, which is inconsistent with the title of the person entitled, (as is admitted in an excellent note in the same work, p. 24), as by the entry of such person; and the levying of a fine seems clearly to amount to such an act. Besides, unless

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the fine had an adverse operation *ab initio*, it could have no effect by non-claim, for it is apprehended that no *subsequent* act changing the relation between the parties could invest it with such an operation.

Whether fine with proclamations bars attendant terms.

Here it should be observed that non-claim in a fine operates as well against termors as the owners of other interests, and it has been laid down that a fine levied by the owner of the inheritance will bar a term which waits on that inheritance, the termor not claiming within five years; *Ischam* v. *Morrice*, Cro. Car. 110; but it seems that, to produce this effect, there must be an evident intention that it shall so operate; and therefore, where the owner of the fee had carved out a term in trust for himself, and to attend the inheritance, and afterwards granted a lease, and covenanted to levy a fine for confirming it, which fine was levied with proclamations, it was held that the termor was barred by non-claim, on this particular ground, "that, taking upon him to make leases, was enough to declare his intent to dispossess his lessee in trust." *Freeman* v. *Barnes*, 1 Vent. 55, 80. In answer to the objection, that by this rule a person levying a fine could not keep on foot mortgages and leases, which it was often convenient to do, the Chief Justice declared his opinion, that, in that case, the fine should not bar, *there not being any intention of the parties to that purpose*. And see *Archbold* v. *Cook*, Noy's Rep. 23; (but see as to which, 1 Vent. 81); *Focus* v. *Salisbury*, Hard. 400.

It has been suggested, that, in order to prevent this operation of fines, they should be declared to enure to corroborate and confirm the terms. Atherl. Shepp. Touchst. 23. According to the authorities cited, however, it should seem that the rule is the converse of this; namely, that in order to make them operate as a bar, a positive intention to that effect should appear, either by express declaration, or constructively from the acts of the conusor. The writer alluded to, indeed, denies that the intention at all governs the question, or that there is any distinction between terms assigned to attend the inheritance, and terms of which the beneficial interest is in third persons, inasmuch as courts of law can take no notice of trusts. But the observation, that Courts of law can take no notice of trusts, must be received with qualification; they cannot, it is admitted, take cognizance of trusts as *such, which are objects of equitable jurisdiction; but, [*154] in the determination of a legal question, they may, and often do, look into the purposes and objects of an instrument, of which the numerous instances in which the legal estate has been held to be in trustees or not, according to the fact, whether the nature of the trust did or did not require that they should have it, afford abundant illustration. (See these cases collected in a note to Pow. on Dev. 3rd edit. 217, 221; see also *Doe* v. *Lynes*, *supra*, p. 125, 126). And it is impossible to suppose that the Courts would hold, in opposition to the authorities before cited, and to the most obvious convenience, that a fine with proclamations bars attendant terms, without a clear intention in the conusor to treat them as adverse. Where such is the intention, a declaration to this effect should be inserted.

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Several periods of entry allowed to a remainder-man.

4thly, That where the fine is levied by a tenant for life in possession, the person in remainder may either enter immediately, or wait until the regular expiration of the estate for life; and the fine will not, therefore, be an absolute bar to him until five years after the death of the tenant for life. *Smy* v. *June*, Cro. El. 220; *Laund* v. *Tucker*, Id. 254; *Fermor's case*, 3 Rep. 79; *Whaley* v. *Tankard*, 1 Lev. 52; *S. C.* 1 Vent. 241; *William* d. *Hughes* v. *Thomas*, 12 East, 141. But this, of course, does not apply to remainders created *after* the levying of a fine, for a person cannot, by carving out particular estates, prolong the period of entry, so as to give a more extended right of claim than he himself possessed. Such a position, however, assumes that a right of entry is alienable by deed or will, whereas the contrary is the better opinion. *Goodright* d. *Fowler* v. *Forrester*, 8 East, 552; *S. C.* 1 Taunt. 578; see Mr. Preston's elaborate and able argument, 1 Taunt. 587. This case, though frequently cited as an authority that a right of entry is not devisable, was ultimately disposed of on another ground.

When the five years begin to run.

5thly, That the period of five years, allowed by the statute, commences from the last proclamation, as to persons *then* having a right of entry, and not under any disability; and as to persons having no immediate right of entry, or being then under a disability, from the period at which the right accrues, or the disability is removed.

Where the disability under which a party labours, at the time of the levying of the fine, or the accruing of his right of entry, continues until his death, the heir (being himself under no disability) must claim within five years from that event; and therefore, where a woman was married when the fine was levied, and continued covert until her death, her heir was held to be barred in five years from her death. *Dillon* v. *Leman*, 2 H. B. 584; see also *Reynolds* v. *Jones*, 2 Sim. & Stu. 206. This point had long been *vexata quæstio*, the case not being within the literal terms of the statute, which only provided for the event of the removal of the disabilities, [*155] and not for the event of the parties *dying without their being removed. See *Cotton's case*, 1 Leon. 211; *Hulm* v. *Heylock*, Cro. Car. 200; *Beverley's case*, 4 Rep. 124; Jenk. Cent. 192, pl. 97. Where a tenant in tail is disseised, and the disseisor levies a fine, and five years pass, the issue are barred by their ancestor's non-claim; but if the tenant in tail conveys the land, and his alienee levies a fine, the issue have five years from the death of their ancestor, because the ancestor could not enter against his own conveyance, and it was to the issue, therefore, that the right of entry first accrued. *Penyston* v. *Lyster*, Cro. El. 896.

Non-claim as to husband and wife.

The protection afforded to a woman under *coverture* does not extend to her husband, who may therefore be barred by non-claim during the coverture, while the right of the wife, to arise at its determination, remains unimpeached. *Hulm* v. *Heylock*, Cro. Car. 200; *Doe* d. *Wright* v. *Plumptre*, 3 Barn. & Ald. 476. And where husband and wife levied a fine,

and the fine was vacated as to the wife on account of her infancy, the husband was held to be bound. *Hutchinson's case*, 3 Lev. 36. And it is to be observed, that, if a man levy a fine of lands, in which his wife is entitled to dower, or of which he is seised in her right, she will be barred of her dower or the inheritance, (as the case may be), by non-claim within five years from his death. *Damport* v. *Wright*, Dy. 224 a; 2 Rep. 93; 8 Rep. 72; see also *Menvill's case*, 13 Rep. 20. This, it has been justly observed, is an exception to the rule requiring adverse possession to constitute a title by non-claim, (see *sup.* p. 151), for there is no possession adverse to the wife during the life of the husband. 1 Prest. Convey. 229. Dower, it will be remembered, does not attach to lands, of which the husband is seised as joint-tenant with another, nor to trusts, or equities of redemption, where the mortgages are *in fee*. *Dixon* v. *Saville*, 1 B. C. C. 325; nor to copyholds, unless by special custom; *Shaw* v. *Thompson*, 4 Rep. 30; nor, it seems, (unless the parties were married by the licence of the king, Harg. & Butl. Co. Litt. 31. b. a.), where the wife is an alien; 13 Rep. 23; *sed quære* whether the wife would not take for the benefit of the Crown in such a case? According to Coke it should seem not, for it is said that if the husband alien, and then the wife become by act of denization dowable, the lands antecedently aliened will not be affected. 13 Rep. 23.

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Dower excluded, when:

Where wife is an alien.

Considering the expense incurred in levying a fine, in order to extinguish the dower of a *feme covert*, and the various questions to which it has incidentally given rise, in regard to non-claim, election, bar by jointures, fine, &c., it were much to be wished, that the practice of introducing limitations to exclude it were extended to wills and voluntary settlements, (as recommended in a late publication by the editor. 1 Pow. on Devises, 3rd edit. 658). If this plan were generally adopted, the right to dower would be seldom practically felt as an inconvenience.

Suggestion as to devising lands to uses to prevent dower.

6*thly*, That an actual entry is necessary to avoid a fine with proclamations. *Berrington* v. *Parkhurst*, 2 Stra. 1086; 4 B. P. C. Toml. edit. 85; *13 East, 489; *S. C. Fitchett* v. *Adams*, 2 Str. 1028; *Oates* d. *Wigfall* v. *Brydon*, 3 Burr. 1897; (but, as to equitable interests, *vide infra*, p. 157); and which, by stat. 4 Ann. c. 16, s. 16, must be followed up by an action "prosecuted with effect," within one year. And the demise in the reversioner's ejectment must be laid on a day subsequent to the entry, from which period only he can recover the mesne profits. *Doe* d. *Compere* v. *Hicks*, 7 D. & E. 433; see also *Reynolds* v. *Jones*, 2 Sim. & Stu. 206. Nor can he, it seems, recover the value of timber cut down by the tenant for life after the levying the fine. *Hughes* v. *Thomas*, 13 East, 474.

Actual entry requisite to avoid a fine with proclamations.

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7*thly*, That where the time has once begun to run against a person, it is not arrested by a disability subsequently arising either to the party himself or his heirs. Thus, if A., who was of sound mind and adult at the time of levying the fine, become *non compos*, or be imprisoned, or die leaving heirs under minority or coverture, within the five years, he and his

Time, once begun to run, not stopped by subsequent disability.

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heirs will be bound at the expiration of that period. *Stowell* v. *Zouch*, Jenk. Cent. 6, ca. 74; Plowd. 55; *Doe* d. Count *Durauze* v. *Jones*, 4 D. & E. 304; see also *Salsbury* v. *Bagott*, 2 Swanst. 609, App.; *S. C.* 1 Ch. Cas. 278; *Doe* d. *Griggs* v. *Shane*, 4 D. & E. 306, n. The distinction stated by Mr. Cruise, 1 Treat. Fines, p. 240, between voluntary and involuntary disability, (though plausible), is contrary to the authorities. It should be remarked, that, though a reversioner has five years from the death of a tenant for life, who has levied a fine, yet it seems that a person who is under coverture when the fine is levied, and becomes discovert during the life of the tenant for life, and marries again, has not five years from the death of her second husband, but will be barred in that period after the death of the tenant for life. *Whetstone* v. *Wentworth*, Dyer, 72 b, pl. 3, 159 a, in margin.

Fine a bar in equity by non-claim, when:

8*thly*, That a fine operates as a bar in equity as well as at law, or, in other words, that where the subject belongs to an equitable jurisdiction, the fine will be a bar in equity under the same circumstances, in which, if the subject had been legal, it would have been a bar at law.

Where levied by equitable tenant in tail.

Thus, a fine with proclamations by an equitable tenant in tail, has been held to be a bar to the equitable remainder-man, in five years after the death of such tenant in tail without issue. *Basket* v. *Peirce*, 1 Vern. 226 (*a*); see also *Clifford* v. *Ashley*, 1 Ch. Cas. 268; *Thynne* v. *Cary*, W. Jones, 416; *S. C.* cit. 2 Swanst. Append. 210; *Salisbury* v. *Baggot*, 1 Ch. Cas. 278; 2 Freem. 21; *S. C.* more fully and correctly reported, *nom. Salsbury* v. *Bagott*, 2 Swanst. 603, Append.; *Bovey* v. *Smith*, 2 Ch. Cas. 126; *S. C.* 1 Vern. 60; *Wakelyn* v. *Warner*, 2 Ch. Cas. 247; *Lin-*

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gard v. *Griffin*, 2 Vern. 189. See also 1 Atk. 476; *Reynolds* v. *Jones*, 2 Sim. & Stu. 206.

By third persons.

So, if lands be held by A. in trust for B., and a third person enter upon them, and obtain a tortious seisin, and levy a fine with proclamations, both A. and B. will be barred at the expiration of the period prescribed by the statute. But if, in such a case, the *cestui que trust* was under a disability at the time of levying the fine, it would be inoperative in equity against him during the period of such disability, though there might be a bar at law by the non-claim of the trustees. *Allen* v. *Sayer*, 2 Vern. 368.

As to fines levied by trustees.

A fine levied by a trustee will of course be inoperative in equity to confer a title by non-claim against the *cestui que trust*, and the trust will attach to any person purchasing of the trustee with notice actual or constructive. *Salsbury* v. *Bagott*, 2 Swanst. Append. 609. And therefore, if the trust appear on the face of the deed or will by which the vendor derives his title, the purchaser has implied notice. Thus, in *Drapers'*

(*a*) But there is ground to contend that the legal estate was in the conusor in this case. The estate tail was *in possession*.

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Company v. *Yardly*, 2 Vern. 662, where a devisee in tail, subject to a charge in favour of A., having sold the lands and levied a fine with proclamations, the lands were held to be liable to the charge in the hands of a purchaser, notwithstanding the fine. But see *Wakelyn* v. *Warner*, 2 Ch. Cas. 247, where it is to be inferred, though it is not stated, that the alienee was heir. The distinction, as expressed in the early authorities, is, that where the equity binds *the lands*, the fine is a bar, but not where it charges *the person in respect of the lands*. *Salisbury* v. *Baggot*, 1 Ch. Cas. 278; *S. C.* 2 Swanst. 603, App.

Fine by mortgagor or mortgagee.

It is clear, also, that a fine levied by a mortgagor or mortgagee is inoperative against the other party. *Welden* v. *Dux Ebor.* 1 Vern. 132. See also 1 Lev. 272; Hard. 402; 1 Vent. 82; Earl of *Pomfret* v. Lord *Windsor*, 2 Ves. Sen. 481; *Hall* v. *Doe* d. *Surtees*, 5 Barn. & Ald. 687.

The case of a fine by the tenant of the equitable freehold presents an exception to the rule frequently laid down in very unqualified terms (1 Prest. Conv. 224), that a fine is inoperative to give a title by non-claim, unless the remainder or reversion be divested or put to a right, (for it is clear there can be no divesting or forfeiture of an equitable interest) (*a*), as well as to the rule requiring actual entry to avoid a fine; *for the proper mode of asserting the claim to lands to avoid a fine [*158] in equity, is by bill in equity, and not by entry. *Clifford* v. *Ashley*, 1 Ch. Cas. 268; *Salsbury* v. *Bagott*, 2 Swanst. 613, App.; *S. C.* 1 Ch. Cas. 278.

As these exceptions, however, arise solely from the nature of the interest, which does not admit of forfeiture or entry, and the rules established in regard to them are strictly analogous to the rules applicable to legal interests, they in fact present no exception to the principle; but, to prevent misapprehension, the terms in which the general rule is laid down should be so expressed as not to embrace them.

Relief in case of fraud.

It should here be observed, that where a party is induced by fraud to

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(*a*) A recent writer has contended, that as equitable remainder men may be barred by non-claim on a fine with proclamations levied by the equitable tenant of the immediate freehold, his interest ought, for the sake of reciprocity, to be forfeitable. Atherl. Shepp. Touch. 14. The fact, however, seems to have been lost sight of, that the forfeiture of an estate for life by the levying a fine, &c., arises from a rule of tenure, which is not applicable to equitable interests, and the analogy between legal and equitable interests cannot be carried farther than where they are governed by common principles. Indeed, the determination suggested (assuming that the Courts at this day *could* so entrench upon the decisions of their predecessors), would be attended with very extensive consequences, by the subversion of one of the main distinctions between the legal and equitable ownership.

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levy a fine, equity can relieve, as in the case of any other conveyance (*Parkes* v. *White*, 11 Ves. 239), such relief being afforded, not by vacating the fine, but by directing a reconveyance; *Wright* v. *Booth*, Toth. 101; *Woodhouse* v. *Brayfield*, 2 Vern. 307; (see also 1 Ves. Sen. 288); though in some cases the fine seems to have been set aside. *Coleby* v. *Smith*, 1 Vern. 205; *Baker* v. *Pritchard*, 2 Atk. 387; see also Id. 380. Any objection to the fine on the ground of irregularity must be made in the Court in which it is levied. *St. John* v. *Turner*, 1 Eq. Ca. Ab. 258, pl. 3.

In what Courts fines with proclamations can be levied.

The operation of barring estates tail, or of conferring a title by non-claim, is, we have seen, restricted to fines *by proclamations* (as to the mode of proving which, see *Doe* d. *Hatch* v. *Black*, 5 Taunt. 685); and in Courts therefore, which have no authority to levy fines with proclamations, as Courts of ancient demesne, *Hunt* v. *Bourne*, Salk. 240, fines cannot be levied for these purposes. But the power of levying these fines is not wholly confined to the Court of Common Pleas: for, by several statutes, fines may be levied with proclamations before the justices of the counties palatine of *Lancaster* (37 Hen. 8, c. 19), and *Durham* (5 Eliz. c. 27); and the high or deputy justice (2 & 3 Edw. 6, c. 28), or the mayor of the Portmoot Court (43 Eliz. c. 15, s. 3), of *Chester*; and the fines levied in these Courts are to be of the same force as fines levied with proclamations in the Court of Common Pleas. So, before the late statute abolishing the Welsh judicature, 1 W. 4, c. 70, fines might have been levied with proclamations before the justices of *Wales*, under the stat. 34 & 35 Hen. 8, c. 26, s. 40.

As to fines without proclamations.

Proclamations, however, are not necessary to give effect to a fine operating as a conveyance by a married woman, nor to create a *discontinuance by tenant in tail; *Driver* v. *Hussey*, 1 H. Bl. 269; but in the latter case the conusor must be *in possession*, and a fine levied by a tenant in tail *in remainder*, though in conjunction with the tenant for life in possession, has no such operation. *Bredon's case*, 1 Rep. 76.

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Effect of discontinuance.

A discontinuance, it should be observed, puts an end to the old seisin; and the consequence is, that the person whose seisin is discontinued can only recover the property by action of formedon (and not by ejectment); but which, by stat. 21 Jac. 1, c. 16, must be brought within twenty years after the title accrues; and this period, in regard to the issue of tenants in tail, has been decided to commence from the period at which their ancestor's title, and not their own, accrued. *Cottrell* v. *Dutton*, 4 Taunt. 826; *Gregory* v. *Hurrill*, 6 J. B. Moore, 525.

What fines may be avoided without entry.

In order to avoid fines levied without proclamations (*Jenkins* d. *Harris* v. *Pritchard*, 2 Wils. 45; *Peaceable* d. *Hornblower* v. *Read*, 1 East, 568; *Doe* d. *Ducket* v. *Watts*, 9 East, 17), or by persons who had no estate of freehold (*Hall* v. *Doe* d. *Surtees*, 5 Barn. & Ald. 687; but see 12 East, 451), actual entry is not necessary.

Operation of fine by estoppel.

Another operation of a fine is to bind by estoppel, or, in other words, to

preclude the conusor and his heirs from ever claiming in opposition to it, though he had no present interest in the lands at the time of levying it.

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Thus, if an heir apparent or heir presumptive levy a fine of the lands of his ancestor, this will confer a title to them against him and his heirs. *Edwards* v. *Rogers*, Sir W. Jones, 456; *Helps* v. *Hereford*, 2 Barn. & Ald. 242. See also 1 Ves. Sen. 391.

Effect where disseisee levies a fine.

According to a resolution in *Buckler's case*, 2 Rep. 55, which is often cited by Mr. Preston, 1 Treat. Convey. 208, 209, 261, 302, 303, 305, "if a disseisee levy a fine to a stranger, it will operate in favour of the disseisor; for the disseisee against his own fine cannot claim the land, and the conusee cannot enter, for the right which the conusor had cannot be transferred to him." The doctrine, however, is denied in some of the early authorities; *Anon.* Gouldsb. 162; *Fitzherbert* v. *Fitzherbert*, Cro. Car. 484; but see also *Bull* v. *Wyat*, 1 Roll. Ab. 863; and the *dictum* of C. J. *Bridgman*, 1 Lev. 128; and it was rejected in a late case, which seemed clearly to fall within the principle. Thus, in *William* d. *Hughes* v. *Thomas*, 12 East, 141, a tenant for life levied a fine *come ceo*, &c. to the use of himself and his heirs, and at his death devised the premises: the devisee entered, subsequently to which the reversioner levied a fine without declaring any uses; and this fine, it was contended, enured to the benefit of the devisee of the disseisor, and precluded the conusor from claiming the lands. The Court, however, held, that *there was no disseisin;* and therefore the doctrine, whether well founded or not, did not apply.

Remarks on *William* v. *Thomas*.

In saying that there was no disseisin in this case, the Court does not appear to have meant that there was no ouster of the freehold, or that the reversion was not divested; for the same learned Judges, in another *case, substantially between the same parties, held, that the reversion [*160] *was* divested (see *Hughes* v. *Thomas*, 13 East, 475): but it is rather to be inferred that the learned Judges meant that the ouster constituted an intrusion (as was contended at the bar), or some other species of ouster as distinguished from a disseisin; see Co. Litt. 277. a.; 3 Blackst. Comm. 156; and that the doctrine in question was only applicable, if at all, to a disseisin properly so called. After such a determination, however, it is impossible to rely upon the doctrine of *Buckler's case* with any confidence: and considering that the rule is productive of such manifest moral wrong, and is not uniformly supported, even by the early authorities, the inevitable conclusion seems to be, that the Courts would reject it altogether. At all events, it does not apply where there is a declaration of the uses of the fine in favour of the conusee. Countess of *Peterborough* v. *Bludworth*, 1 Lev. 128.

Whether fine *come ceo*, &c., extinguishes a contingent remainder.

Another question, which has been sometimes discussed in connection with the last, is, whether a fine *come ceo*, &c. will extinguish a contingent remainder. Upon this point the opinions of the most eminent text writers

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have been conflicting. Mr. Preston had advanced an opinion in the affirmative, citing *Buckler's case* as an authority for the position; see 2 Treat. on Convey. 137; while, on the other hand, Sir E. B. Sugden maintained, that a fine, of whatever description, by a person having a contingent interest, would operate to pass it by estoppel. Gilb. Us. 124, n.

The point, however, has been set at rest by a recent decision, establishing that a fine *come ceo*, &c., levied by a contingent remainder-man in fee, does not extinguish his interest, and thereby enure to the benefit of the person seised of the estate, contrary to the intention of the parties. The rule, as stated by Mr. Justice *Bayley*, after an elaborate examination of the authorities, being, "that a fine by a contingent remainder-man passes nothing, but leaves the right as it found it; that it is therefore no bar when the contingency happens *in the mouth of a stranger to that fine*, against a claim in the name of such remainder-man; that it operates by estoppel and by estoppel only; and that parties or privies may avail themselves of that estoppel, *but parties or privies only*." *Doe* d. *Brune* v. *Martyn*, 8 Barn. & Cress. 497; 2 M. & R. 485.

Operation of fine by the owner of a contingent or executory interest.

And not only does such a fine not extinguish the contingent or executory interest, but it vests that interest completely in the conusee, or rather in the *cestui que use*, so that, when the contingency happens, the estate is actually in him, not only as against the conusor himself, but as against third persons; for it is said, that though the fine operates by estoppel only until the contingency happens, yet from that time it operates upon the estate precisely in the same manner as if the conusor had been seised of the estate when the fine was levied. This point was decided in the late case of *Doe* d. *Christmas* v. *Oliver*, 10 Barn. & Cress. 181, where lands had been devised to A. for life, and, after her decease, to the children of B. who should be living at A.'s decease, in fee. During the life of A., one of the children (and who proved to be the only surviving child) of B. levied a fine, and demised the lands for securing an annuity. The persons claiming under this demise brought an ejectment after the death of A. The Court held, that the estate was in the lessor of the plaintiff, for "that a fine by a contingent remainder-man, though it operates by estoppel, does not operate by estoppel *only*, but that *it has an ulterior operation when the contingency happens; that the estate which then becomes vested feeds the estoppel;* and that the fine operates upon that estate, as though that estate had been vested in the conusors at the time the fine was levied."

It should seem to follow, from the doctrine of this case, that a deed or fine, executed or levied by a remainder-man, would not eventually pass the estate, unless it were such as is capable of operating by estoppel in the first instance; and it leads to this suggestion, that where an assurance is to be made, whose incipient operation will be by way of estoppel only, *i. e.* where the grantor has no present estate, all the circumstances which, according to the old authorities, are essential to an estoppel, should be at-

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tended to; the assurance, if not by matter of record, should be by *indenture*, and it should, according to the doctrine of the case of *Hermitage* v. *Tomkins*, 1 Lord Raym. 729, not appear upon the face of the instrument, that the grantor had no interest. It is remarkable, that, in *Doe* v. *Oliver*, no objection was taken to the operation of the fine on the ground of this doctrine, though there can be little doubt that the deed declaring the uses of it disclosed the state of the title, as the conusor was described, at the commencement of the deed, as devisee of the will under which he claimed, and which no doubt was subsequently recited. It is true, that, in *Hermitage* v. *Tomkins*, the estoppel was by indenture and not by fine; but this, it is conceived, constitutes no solid distinction, inasmuch as a fine and a deed declaring the uses of it operate but as one assurance, and therefore the recital in the deed, it should seem, would be equally operative to control the effect of the fine, as the recital in a deed would be to control any part of that deed. Whether, in opposition to this reasoning, and in order to reconcile *Hermitage* v. *Tomkins* with *Doe* v. *Oliver*, the Courts would now consider the doctrine of the former case as confined to estoppel by indenture, as distinguished from estoppel by fine, or whether they would treat the doctrine as overruled in its application even to estoppel by indenture by the latter case, seems doubtful. The cautious practitioner will, no doubt, avoid raising the question, by omitting, both in regard to fines and indentures which are intended to operate by estoppel, any disclosure of the fact of the conusor's or grantor's having no present estate; covenants for title, or any other matter which would lead to such disclosure, must of course be inserted in a separate deed.

II. As to the form and manner of levying fines.

In what Courts to be levied.

Fines may be levied in any Court of record which has jurisdiction over the lands.

The Court of Common Pleas is the proper Court for levying fines of lands of freehold tenure in England and Wales, except in the counties palatine. A fine levied in the Common Pleas of lands in those counties is void. 4 Inst. 205, 223. Fines may also be levied in Courts of ancient demesne. *Hunt* v. *Bourne*, Salk. 339; *S. C.* 4 B. P. C. Toml. ed. 66.

Effect of fine in C. P. of lands in ancient demesne.

A fine levied in the Court of Common Pleas of lands in ancient demesne is voidable by the lord (provided, of course, that he be not a party *to it), by a writ of disceit (*Rex* v. *Mead*, 2 Wils. 17), and which also avoids it between the parties, (*Cary* v. *Dancy*, Cro. El. 471; but see 10 Rep. 50 a, 1 Bac. Ab. 112), and may be brought notwithstanding their death (*Zouch* v. *Thompson*, 1 Lord Raym. 177); but in the mean time it has the effect of converting the tenure into frank fee; and therefore, until the lord's jurisdiction be restored, another fine cannot be levied in his Court. By the [*161]

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second fine the lord may be barred by non-claim. *Cockman* v. *Farrer*, T. Raym. 461; *Zouch* v. *Thompson*, 1 Lord Raym. 177.

The particulars chiefly requiring attention in the mode of levying a fine relate to the *præcipe* and *concord*, and the taking of the acknowledgments.

As to the parts of a fine, see Shepp. Touchst. 3; 2 Bl. Com. 350; Wils. 3; Crui. 7. In referring to particulars of this kind, instead of stating them, the Editor is aware that an appearance of incompleteness is given to the present Essay; but he is anxious to avoid going again over ground which has been so often trodden, and where the subject is of no immediate practical use.

FORMS OF PRÆCIPE, &c.

PRÆCIPE AND CONCORD *for Fine* sur Conusance de Droit come ceo, *&c.*

Præcipe.

SOMERSETSHIRE, *to wit.* COMMAND [Sir John Williams, Baronet], and [Dame Ann] his wife, that justly and without delay they perform to [William Davies, Esq.] the covenant made between them of two messuages (*a*), two dove-houses, two orchards, two gardens, one hundred acres of land (*b*), one hundred acres of meadow, five hundred *acres of pasture, one hundred acres of wood, one hundred acres of land covered with water, with the appurtenances, in the parishes of [Worle] and [Langford]. And unless, &c.

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Concord.

AND THE AGREEMENT is such, to wit, that the said [John] and [Ann] have acknowledged the aforesaid tenements,

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Term "messuage" comprehends, what.

(*a*) The term "messuage" will pass a house, curtilage, garden, orchard, dove-house, &c., and a chapel or hospital may pass under this denomination. See 2 West's Symb.; Prest. Shepp. Touchst. 12. The word *tenement* or *hereditament* is too general in the principal description.

(*b*) *i. e.* Arable, which is usually so denominated in fines and recoveries, though it has been held that meadow will pass under the denomination of "land." *Cooke* v *Yates*, 4 Bing. 90; *S. C.* 12 Moore, 296.

with the appurtenances, to be the right of him the said [William], as those which the said [William] hath of the gift of the aforesaid [John] and [Ann], and those they have remised and quit claimed from them and their heirs, to the aforesaid [William] and his heirs for ever; AND morever the said [John] and [Ann] have granted for themselves, and the heirs of the said [Ann], that they will warrant to the said [William] and his heirs the aforesaid tenements, with the appurtenances, against them the said [John] and [Ann], and the heirs of the said [Ann], for ever. And for this, &c.

Warranty, where the inheritance is in the wife.

Taken and acknowledged by the above-named [Sir John Williams] and [Dame Ann] his wife, the —— day of ——, 1827. } [*Signatures of Conusors*].

[*Allocatur*].

Before [*Signatures of Commissioners*].

The piece of parchment containing the caption should be annexed to the *Dedimus*, on which a memorandum should be indorsed, signed by the commissioners, to this effect:

"The execution of this writ appears by the schedule hereto annexed."

Where the inheritance is in the husband, the warranty will be thus:

"AND moreover the said [John] and [Ann] his wife have granted, for themselves, and the heirs of the said [John], that they will warrant to the said [William] and his heirs the aforesaid tenements, with the appurtenances, against them the said [John] and [Ann], and the heirs of the said [John], for ever. And for this, &c.

Warranty, where the inheritance is in the husband.

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PRÆCIPE AND CONCORD *for a Fine* come ceo, *&c. where the Lands are in* TWO COUNTIES (*a*); *and there are* SEVERAL CONUSORS AND CONUSEES.

Præcipe of fine of a manor, franchises, fee-farm rent, &c.

WILTSHIRE, *to wit.* COMMAND [James Stokes], Esq. and [Mary] his wife, and [Daniel Evans], Gent., and [Frances] his wife, that justly and without delay they perform to [Richard Savage] and [Samuel Johnson] the covenant made between them, of the manor of [D], with the appurtenances, and of three messuages, three gardens, fifty acres of land, fifty acres of meadow, fifty acres of pasture, fifty acres of furze and heath, common of pasture, and common of turbary, Courts Leet, Courts Baron, view of frank pledge, goods and chattels of felons, felons of themselves, persons outlawed and put in exigent, deodands, waifs, estrays, returns of writ, liberties and franchises, the yearly rent of twenty pounds issuing out of one messuage, with the appurtenances, in the parish of [Winkfield]. And unless, &c.

Of lands in another county.

MIDDLESEX, *to wit.* COMMAND [*the same parties as before*], that justly, &c. the covenant made between them of one third part of one messuage, and one garden, in the parish of [St. Mary, Islington], with the appurtenances. And unless, &c.

Concord.

AND THE AGREEMENT is such, *to wit*, that the said [James Stokes] and [Mary] his wife, and [Daniel Evans] and [Frances] his wife, have acknowledged the manor, tenements, common, Courts Leet, Courts Baron, view of frank pledge, goods and chattels of felons, persons outlawed and put in exigent, deodands, waifs, estrays, returns of writ, liberties and franchises, and rent, and part aforesaid, with the appurtenances, to be the right of him the said

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Where lands are in several counties.

(*a*) Where a fine is levied of lands in several counties, there must be several *præcipes* and writs of covenant; but one concord, *&c. Po.*, and acknowledgment are sufficient. 2 West's Symb. 8.

[Richard], as those which the said [Richard] and [Samuel] have of the gift of the aforesaid [James Stokes] and [Mary] his wife, and [Daniel Evans] and [Frances] his wife; and those they have remised and quit claimed from them, and their heirs, to the aforesaid [Richard] and [Samuel], and the heirs of the said [Richard], for ever (*a*). And moreover the said [James] and [Mary] his wife have granted for themselves, and the heirs of the said [James], that they will warrant to the said [Richard] and [Samuel], and the heirs of the said [Richard], the aforesaid *(repeat parcels as before)*, with the appurtenances, against them the said [James] and [Mary], and the heirs of the said [James]. And furthermore, the said [Daniel] and [Frances] his wife have granted for themselves and their heirs, that they will warrant to the said [Richard] and [Samuel], and the heirs of the said [Richard], the *(repeat parcels as before)*, against them the said [Daniel] and [Frances] his wife, and their heirs, for ever (*b*). And for this, &c.

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Form, where there are several conusees.

Taken and acknowledged by the above-named [James Stokes] and [Mary] his wife; and by the said [Daniel Evans] and [Frances] his wife, the 10th day of August, 1827.

[*Signatures of Conusors*].

[*Allocatur*].

Before

[*Signatures of Commissioners*].

The acknowledgments of all the conusors, however numerous, must be taken on one piece of parchment. *Balch* v. *Phelps*, 3 Bos. & Pull. 366.

(*a*) The Court will not, except as to gavelkind lands, allow a fine to be levied to two persons, and their heirs; "for the fee-simple ought to be determined in one person certain;" 2 Rep. 74; and the practice therefore is, where there are two conusees, to levy it to both, and the heirs of one. 2 Rep. 74. But if fines to the heirs of several be once received, they will be valid; the rule being *fieri non debuit sed factum valet*. Bro. Fines, 5; 5 Rep. 38.

Fine must be levied to the heirs of one person only.

(*b*) The warranty, being from the heirs of both, supposes the inheritance to be in both.

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PRÆCIPE AND CONCORD *for Fine* sur Conuzance de Droit tantum, *levied of a Reversion in Fee expectant on an Estate for Life.*

Præcipe of fine of a rectory, tithes, advowson, &c.

WORCESTERSHIRE, *to wit.* COMMAND [A. B.], that, justly and without delay, he perform to [A. C.] the covenant made between them of one messuage, one curtilage, one garden, one hundred acres of land, one hundred acres of pasture, common of pasture, and fifty shillings' rent in [P.], and of the rectory of [T.], with the appurtenances, and of all and all manner of tithes whatsoever to the said rectory belonging or appertaining, and also of the advowson of the church of [P.] (*a*). And unless, &c.

Concord.

AND THE AGREEMENT is such, *to wit,* that the aforesaid [A. B.] hath acknowledged the aforesaid tenements, common, rent, and rectory, with the appurtenances, and the

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As to advowsons and tithes.

(*a*) Advowsons and tithes are always described without the word "appurtenances." The fullest information as to the description of parcels will be found in Wilson, p. 126; Hands on Fines, 193; Prest. Shepp. Touchst. 10. In cases of difficulty it is better to consult the Cursitor. The parcels should be amply sufficient to comprise the subject of which the fine is levied; but as the amount of the fees payable at the offices is regulated by their extent, (unless the actual quantity of which the fine is intended to be levied be shewn by affidavit), they should not be unnecessarily large. Where the parcels of a fine or recovery are inaccurate or defective, the Court will correct or supply them by the deed declaring the uses, on affidavit. 2 Bos. & Pull. 578, 580, n.; 6 Taunt. 489; 4 J. B. Moore, 170; 8 Ib. 163, 334; but see 2 New Rep. 480. As to the affidavit requisite, see 2 Taunt. 1; 6 Ib. 432; 7 Ib. 697; 6 J. B. Moore, 250. But if the lands are omitted or totally misdescribed in the deed, the mistake is irremediable; 3 Bos. & Pull. 362; 2 Taunt. 96; 6 Ib. 145; though a misdescription, which does not render the identity of the lands doubtful, will not be material. 5 Taunt. 207; 6 J. B. Moore, 520; but see 7 Taunt. 177; 8 J. B. Moore, 520. As to where the deed was lost, see 7 Taunt 79. As to correcting the misnomer of parties, see 2 Bl. 816; 2 Bos. & Pull. 455; but see 3 J. B. Moore, 241; 8 Ib. 449. Any person who has an adverse interest may be heard against the amendment. 7 Taunt. 352.

Where the Court will amend parcels in fine.

tithes and advowson aforesaid, to be the right of the said [A. C.], and he hath granted, for himself and his heirs, that the aforesaid tenements, with the appurtenances, which [C. D.] holds for the term of the life of [E. F.] of the inheritance of the said [A. B.], on the day on which this agreement was made, and which, after the decease of him the said [E.], ought to revert to the said [A. B.] and his heirs, shall, after the decease of the said [E.], entirely remain to the said [A. C.] (*a*), and his heirs, for ever. And the aforesaid [A. B.] hath granted, for himself and his heirs, that he will warrant to the said [A. C.], and his heirs, the aforesaid *(repeat parcels)*, in such manner as is aforesaid, against him the said [A. B.] and his heirs, for ever. And for this, &c.

FORM AND MANNER OF LEVYING FINES.

Taken and acknowledged, &c.

PRÆCIPE AND CONCORD *for Fine* sur Concessit.

[*Præcipe as before*]. AND THE AGREEMENT is such, *to wit*, that the aforesaid [A.] hath granted to the aforesaid [B.] the aforesaid *(parcels in general terms)*, with the appurtenances, *To hold* the aforesaid *(parcels in general terms)*, with the appurtenances, from the first day of January, 1831, until the full end and term of ninety-nine years from thence next ensuing and fully to be complete and ended, yielding and paying, &c. And the aforesaid [A.] hath granted for himself and his heirs, that he will warrant to the aforesaid [B.] the *(parcels in general terms)*, with the appurtenances, against him the said [A.], and his heirs, during the term aforesaid. And for this, &c.

Concord of fine *sur concessit.*

Taken and acknowledged, &c.

(*a*) Where both the parties have the same Christain name, the surname should be retained throughout. As to names and titles, see Hands on Fines, 232.

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Before whom fines to be acknowledged.

Qualifications of commissioners.

A fine may be acknowledged either before the Chief Justice of the Common Pleas, who has this authority by custom, or at bar in open Court, or before a judge, or baron, or serjeant at law, to whom a writ of *dedimus potestatem* is directed; or, where the parties reside in the country, to commissioners, who must, by the rule of Mich. Term, 39 Geo. 3, (see 1 Bos. & Pull. 362; 4 Moo. & Pay. 9), be barristers of five years' standing, or solicitors or attornies of some of the Courts in Westminster Hall, the Judges of the Courts of Session and Exchequer, or advocates and clerks to the signet of five years' standing in Scotland, (though the rule has sometimes been dispensed with under particular circumstances, *Matthews* and *Ux.*, 7 Taunt. 696; *Hack*, 4 Moo. & Pay. 9), and the qualifications of the commissioners are required to be stated in the affidavit. (*Vide* form *infra*).

The particulars to be attended to in taking the acknowledgments will be found in the following affidavit, which must be written on parchment, and annexed to the *De. Po.* and caption:

FORM OF AFFIDAVIT, *to be made by one of the Commissioners taking the Acknowledgment of a Fine by a married Woman.*

Affidavit by commissioner of the due taking of the acknowledgment.

[A. B], of ——, in the county of ——, Gent., one of the attornies of his Majesty's Court of ——, at Westminster, and one of the commissioners named in the writ of *dedimus potestatem* for taking the acknowledgment of the fine hereunto annexed, maketh oath and saith, That he knows [C. D.] and [E.] his wife (*a*), [*if part only of the conusors*, " two of,"] the conusors named in the said fine; and that the same was duly signed and acknowledged by them the said [C. D.] and [E.] his wife, before this deponent and [*other commissioner*], Gent., one other of the attornies of his Majesty's Court of ——, at Westminster, and another of the commissioners named in the said writ, on the day and year [*or* days and year], mentioned in the caption (*b*) [*or* in the first (second or third) caption] thereof. And that the said [C. D.] and [E.] his wife, and also this deponent, and the said [*other commissioner*], were and each of them was at the time of taking and ac-

(*a*) See rule of Hilary Term, 17 Geo. 2, stated Wils. 101; Cruise, 84; Miller, 44.

(*b*) See rule of Hilary Term, 26 & 27 Geo. 2, Wils. 105; Cruise, 85; Miller, 46.

knowledging of the said fine, of full age and competent understanding; and that the said [E.] was solely and separately examined apart from her said husband (*a*), and freely and voluntarily consented to and acknowledged the said fine (*b*); and that the said [C. D.] and [E.] his wife, severally and respectively knew the same to be a fine, to pass his, her, and their estate or estates. And this deponent further saith, that he this deponent, [*or* the said *(other commissioner) as the case may be, adding, if not the commissioner making the affidavit,* " whose place of residence is at ——,"] is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of any or either of the parties to the said fine (*c*). And this deponent further saith, that, in pursuance of the order made by this Honourable Court, in Easter Term, in the eighth year of the reign of his Majesty King George the Fourth, respecting the acknowledgment of fines and recoveries, the said commissioners did inquire of the said [E.] [*or, if more than one,* " of each of them, the said[E.]," &c.], whether she intended to give up her interest in the estates to be passed by such fine, without having any provision made for her in return for or in consequence of her so giving up her interest in such estates; and that, in answer to such inquiry, the said [E.] declared that she did intend to give up her interest in the said estates, without having any provision made for her in return for or in consequence of her so giving up her interest; which declaration of the said [E.] this deponent has no reason to doubt the truth of, and verily believes the same to be true. [*or* " declared that a provision was to be made for her in return for or in consequence of her giving up her interest in the said estates; and this deponent, before her acknow-

(*a*) If there be more than one person, the words will be " were solely and separately examined apart from their respective husbands."

(*b*) See Rule of Hilary Term, 17 Geo. 2.

(*c*) The Rule of Easter Term, 8 Geo. 4, only requires that *one* of the Commissioners shall not be concerned as the attorney, &c. of the party, the rule of the preceding Term, extending the requisition to *all* the Commissioners, having been rescinded.

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ledgment was so taken, was satisfied, and does now verily believe that such provision has been made"] (*a*).

Recent rule as to taking the acknowledgments of married women.

(*a*) This part of the affidavit is required by the late rule of Easter Term, 8 Geo. 4, whereby "it is ordered, that, from and after the first day of next Term, the commissioners do inquire of married women whether they intend to give up their interests in the estates to be passed by any fine or recovery, without having any provision made for them in return for or in consequence of their so giving up such interests; and if it appears to such commissioners, that any provision is to be made on any such married woman, they shall not take her acknowledgment until they are satisfied that such provision has been made; and one of the commissioners taking the acknowledgment of such married woman, shall state in the affidavit to be made of the due taking such acknowledgment, that such inquiry was made, and also the answer given thereto, and where any such provision has been agreed to be made, that he the said commissioner is satisfied that the same has been made; and where such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, that he the said commissioner has no reason to doubt the truth of such declaration, and verily believes the same to be true." Further, "That, from and after the first day of the next Term, the affidavit of the due taking of any acknowledgment to any fine or recovery shall be in the form hereunto annexed, with such variations only as the circumstances of the case shall render necessary, and that the party or parties making the same do pursue the exact words of such form, and do not, unless absolutely necessary, substitute others which he or they may think synonymous thereto." And lastly, "That the commissioners, before they sign their names to the caption of such acknowledgment, do take care that the signatures of the parties correspond with the *præcipe* and *dedimus*, and that, if any of the names are not correctly stated in the *dedimus*, they forbear to take the acknowledgment until the writ shall have been amended by the proper officer." It should seem, therefore, that if the conusor declare that she expects a provision, but that she is willing to rely upon her husband's promise to make it, without previously exacting its performance, the commissioners are not at liberty to take the acknowledgment. In pushing the rule to this extent, the Court seems to have made rather a considerable encroachment upon the *jus disponendi* of *femes covertes*. It may be doubted, whether the rule, however well intended, is not more likely to produce prevarication in attempts to avoid it, than to afford any efficient protection to its objects.

As to interlineations.

If there be any rasure or interlineation in the body of the fine, it must be stated in the affidavit, "that such rasure or interlineation was made

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before the party or parties signed the said fine, and before the caption was signed by the commissioners." See Rule H. T. 26 & 27 Geo. 2. The rule has sometimes been dispensed with, under circumstances, on application to the Court. *Clarke & Ux.* 6 Taunt. 586. Where one deponent cannot speak to all the facts, several persons should join in it, each deposing to the facts within his knowledge.

As to acknowledgments taken abroad.

In *Cruttenden* v. *Bourbell & Ux.* 1 Taunt. 144, the Court declared the following rule to extend to fines: 14 Geo. 3, "That if the party or parties shall be in *Ireland, or in any other parts beyond the seas,* then the affidavit or affidavits shall be made by one of the commissioners who hath taken the acknowledgment of such warrant or warrants of attorney, and shall be sworn either before some persons duly authorized to take affidavits in this Court, or before some magistrate of the place where such acknowledgment shall be taken, having authority to administer an oath, and in the presence of a public notary; which notary shall also certify in writing, under his hand and seal, as well the due administering of the said oath, as also the name, signature, and office of the magistrate administering the same."

In other respects, the fines acknowledged abroad must be in conformity to the general rules of Court. Thus, the affidavit must be on parchment; *Maunder* dem. 5 Taunt. 263; *Pulmer*, plaintiff, 4 J. B. Moore, 162; no part of the acknowledgment must be written on an erasure; *Tippitt*, plaintiff, 2 J. B. Moore, 375; and if a schedule be referred to on the back of the *de. po.* it must be signed by the commissioners. *Graham*, plaintiff, 4 J. B. Moore, 295. The notarial certificate must also be on parchment; *Randall*, plaintiff, 6 J. B. Moore, 232; and under seal, *Cruttenden* v. *Bourbell*, 1 Taunt. 144, unless no seal be used by notaries at the place. *Price* dem. 4 Taunt. 573.

The Court has sometimes dispensed with the notarial certificate altogether; as where it was attempted to be made an instrument of extortion. *Ruding* v. *Manning*, 2 Taunt. 313.

Acknowledgment, within what period to be returned.

By stat. 23 El. c. 23, s. 5, the commissioners are to certify the acknowledgments within twelve months; and by a rule of 36 Geo. 3, 1 Bos. & Pull. 530, no fines which appear to have been acknowledged more than twelve calendar months, shall pass the King's Silver Office, without a rule of the Court in Term term, or order of a Judge in vacation, or an affidavit stating that the conusors are living, or, if dead, the time of their deaths; which affidavit must be filed with the *præcipe* and concord.

By another rule (52 Geo. 3, 4 Taunt. 600), all fines are to be left at the office of the chirographer, within fourteen days after they have passed the King's Silver Office.

Fine, when defeated by death of parties.

If the conusor or conusee of a fine die before the return of the writ of covenant, it is void. *Wright* v. Mayor of *Wickham*, Cro. El. 468; *Clements* v. *Langhorne*, 2 Lord Raym. 872; and the Court will vacate it

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upon affidavit of the fact; *Watts* v. *Birkett*, 2 Wils. 115; but, according to the present practice of making the writ returnable in the preceding Term when it is sued out in vacation, this can rarely happen. A fine may also be stopped in consequence of the death of either party, (but not of one of *several* conusors or conusees), after the return, and before the King's silver has been paid. See *Biddulph* v. *Harrison*, 2 Lev. 127. But as it is the practice since stat. 32 Geo. 3, c. 14, to pay the King's silver on suing out the writ, this also is an uncommon event.

A necessary precaution, therefore, for purchasers and mortgagees is, to ascertain that the King's silver has been paid, after which the death of the conusor or conusee would not affect the fine. *Warnecombe* v. *Carell*, Dy. 220 b, pl. 15. And, where the object of the fine is to bar an entail, it is not material that the proclamations are made after the death of the conusor. *Parslow's case*, cit. 3 Rep. 90 b.

Omission to levy a fine through negligence.

Where a fine is omitted to be completed, through the negligence of the attorney or his agent, the Court will not, it seems (unless in particular cases, *Hayward* v. *Leath*, 2 J. B. Moore, 174,) allow it to pass; *Fawcett* v. *Slingsby*, 7 J. B. Moore, 338; but will direct another fine to be levied at his expense. *Stone* v. *Stone*, 4 Taunt. 601. But *contra*, it seems, where the delay is occasioned by the neglect of their own officer. *Fitchley*, 6 J. B. Moore, 315.

III. As to the declaration of the uses of a fine.

Uses result, when.

Where no use is declared of a fine, the use results to the conusor or conusors, according to the state of the ownership at the time of levying it, 1 And. 184; *Armstrong* d. *Neve* v. *Wolsey*, 2 Wils. 19, regard being had, however, to the operation of the fine on that ownership. Thus, where A., tenant for life, and B., tenant in tail in remainder, levy a fine, the uses will result to A. for life, with remainder to B. *in fee*, (determinable on the failure of his issue), such being the estate which, by the operation of the fine, vested in the conusee. See Bridg. 556. Where the tenant in tail is in possession, the resulting fee will (by the effect of the discontinuance), be determinable by action only. *Vid. sup.* p. 159.

If the use of a fine in fee is limited simply to A. (without words of limitation), he takes an estate for life only; *Egerton's case*, Cro. Jac. 525; and the reversion in fee, it should seem, would result.

Whether conusee should join in deed declaring the uses.

But though the conusee is, *in general*, merely a nominal party, it is not unusual to make him join in declaring the uses, in order to preclude the possibility of any assertion of title on his part; for it is material to observe that the resulting use may be negatived by parol evidence, shewing that the estate was intended to remain in the conusee; *Roe* d. *Rouch* v. *Popham*, Doug. 25; and proof of a consideration, moving *from the conusee to the conusor; Vaugh. 83; 2 Rep. 57; or that there is a purpose to be answered, which requires that the conusee should retain the estate, as

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where he is subsequently made a tenant to the *præcipe* for suffering a common recovery, will rebut the resulting use. Lord *Anglesea* v. Lord *Altham*, Salk. 676; *S. C.* Gilb. Eq. Cas. 16; *Thrustout* v. *Peak*, Stra. 16. Where the deed directing the uses precedes, or is contemporaneous with the levying of the fine, it is less material that the conusee should be a party than where it is subsequent, particularly if the length of time intervening between the fine and declaration of uses is considerable, in which case his concurrence should always be obtained (*a*).

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It is no objection to a deed declaring the uses of a fine, that a considerable time has elapsed since the fine was levied; *Bushell* v. *Burland*, Rep. temp. Holt, 733; *S. C.* 11 Mod. 196; but it has been suggested, that in such a case a question might arise as against *strangers*, whether the fine, when levied, was intended to enure to those uses. Sugd. Pow. 4th edit. 69. It seems clear, however, that uses, which could not possibly have been in contemplation at the time of the levying of the fine, may be declared; as where a fine is levied, the estate afterwards sold, and the uses declared in favour of the purchaser. A delay in declaring the uses of a fine once levied ought in general to be avoided.

Resulting uses were excepted out of the Statute of Frauds, 29 Car. 2, c. 3; but doubts arose, after the passing of the act, whether its provisions did not require that the declaration of uses and trusts should be contemporaneous with the creation of them, so as to preclude subsequent declarations of uses of fines; which led to the stat. 4 Ann. c. 16, by which it is enacted, that all declarations, &c., of uses by deed, *after* the levying and suffering of fines and recoveries, should be good. This statute, it will be observed, requires *a deed*, and has sometimes been thought to require a deed indented. 2 Prest. Convey. 41; but see Sugd. Gilb. 113. As it is the invariable practice, however, to declare the uses by indenture, the point is not practically of much importance. If the uses should subsequently be declared by a writing only, it would raise the question, whether the construction of the statute of frauds, which led to the subsequent act, was well founded. The negative is strongly contended for by Sir E. B. Sugden. Sugd. Gilb. Us. 114.

As to subsequent declarations of uses.

Where husband and wife levy a fine of the wife's lands, both should concur in declaring the uses, though a declaration of the uses by the husband alone will bind the wife, *unless she dissent*. *Beckwith's case*, *2 Rep. 57; see also *Webb* v. *Worfield*, Roll. Ab. 798. And Lord *Hardwicke* refused to set aside a fine at the instance of the wife, after fifteen

Declaration of uses by husband and wife.

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(*a*) It is apprehended that the non-concurrence of the conusee in declaring the uses, would not, in ordinary cases, if the possession has been according to those uses, form a valid objection to the title. Clearly not, if the deed preceded the fine. See 2 Salk. 677; 4 Mod. 263; Com. 30.

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years' acquiescence. *Swanton* v. *Raven*, 3 Atk. 105. But a declaration of the uses by the wife alone is void; and such is the effect where the husband and wife declare different uses. As to the rule where the uses differ in part only, see 1 Prest. Convey. 313; Sug. Gilb. Us. 82, n. The point rarely occurs in practice.

Dowress need not join in declaration of uses.

In cases in which a married woman levies a fine, for the purpose of extinguishing her dower, it is not necessary, though usual and advisable, to make her concur in declaring the uses, for as dower is merely a right, and not an estate, it will be extinguished by the fine alone. *Haverington's case*, Owen, 6; *S. C.* 13 Vin. 316, pl. 3; *Eare* v. *Snow*, Plow. 514.

Effect of dowress joining in a fine to mortgagee.

So, where she joins in a fine for the purpose of giving effect to a mortgage, her dower (notwithstanding the redeemable nature of the security *in equity*), being purely a legal right, is absolutely gone. Upon this, however, a difference of opinion has sometimes been entertained, and the error (for so, we apprehend, the contrary opinion must be deemed,) appears to have arisen from confounding the case of dower with that in which the inheritance is in the wife, when, it is well known, the Courts hold not only that the mortgage does not, *per se*, change her interest in the equity of redemption, but that there must be a distinct manifestation of intention, in order to subject the ulterior ownership to any new modification. See the cases on this subject treated of, 2 Cov. Pow. Mort. 732; 1 Jac. Rop. Husb. & Wife, 153; Patch, Mortg. 171; Coote, Mortg. 547. But such a case is wholly dissimilar in principle from the case under discussion. There the inheritance, which is in the wife, is as much an object of recognition and protection in a Court of equity as in a Court of law; but dower is a mere legal right, which being extinguished by the fine at law, can never be revived in equity, since it does not attach to subjects merely equitable. *Vide supra*, p. 155. This principle is very clearly illustrated in Lord *Redesdale's* judgment, in *Darcy* v. *Blake*, 2 Sch. & Lef. 388.

Contrariety of opinions upon the point.

Doctrine of the early cases.

Some of the positions in the early cases, indeed, may seem to support the doctrine against which these observations are directed. See *Naylor* v. *Baldwin*, 1 Ch. Rep. 130; *Goodrich* v. *Brown*, 1 Ch. Cas. 49; *Dolin* v. *Coltman*, 1 Vern. 294; *Danby's case*, 2 Eq. Ca. Ab. 385, pl. 2; *S. C.* Pre. Ch. 34; but in no instance does it appear to have formed the sole ground of determination; and it is to be observed, that, at this early period, it was by means so well settled as it now is, that dower does not attach to equities of redemption, (*vide supra*, p. 155)—a principle which seems to be totally subversive of the doctrine in question.

Opinions of Sir *T. Sewell* and Lord *Redesdale*.

To the more early opinions, however, before cited, must be added that of Sir *T. Sewell*, who, in *Jackson* v. *Parker*, Amb. 687, (though the case did not raise the point), considered that a wife who had joined *in a fine of her husband's estate to a mortgagee in fee, might redeem, and hold the estate until her dower was allowed; and this *dictum* was cited by Lord

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Redesdale in *Jackson* v. *Innes*, 1 Bligh, 123, in the House of Lords, without disapprobation; his Lordship himself stating the principle to be the same, whether the wife was owner of the inheritance, or a dowress only. But as the question of dower was not raised in either of these cases, the opinions of both these learned Judges, however respectable, must be regarded as extra-judicial; their statement of the doctrine, however, has been adopted, without hesitation, by the most approved writers on the subject. 1 Jac. Rop. Husb. and Wife, 537; Coote on Mortgages, 548; Patch, 175; 2 Cov. Pow. Mort. 675. The point a few years since arose in practice, in consequence of an objection taken on behalf of a purchaser, by a gentleman of great experience, who delivered the following opinion:—

Further opinions as to the operation of a fine and mortgage upon dower.

"Whatever may be the decision of a Court of equity upon the point respecting Mrs. G———'s right to dower, I do not feel sufficiently confident to advise the purchaser to dispense with another fine, if Mrs. G——— be living, and not barred of dower by settlement.

"The rule seems to be, that when a fine is levied by husband and wife for a particular purpose, such as for securing a mortgage debt, the Court will restrain the operation of the fine to that particular purpose, although the words of the deed go beyond it. See *Collett* v. *Barker*, Anst. 138; *Jackson* v. *Parker*, Amb. 687; and *Innes* v. *Jackson*, 16 Ves. 356. These cases, indeed, are not precisely in terms like the present, but it would be difficult to distinguish them in principle.

Lincoln's Inn, Aug. 28, 1816."

A case, with this opinion, was then laid before Mr. *Hayes*, whose opinion was as follows:—

"I have considered the question raised by Mr. ——— with respect to the operation of the mortgage deed and fine, of ——, in precluding Mrs. G——— from all claim of dower, and I cannot satisfy my mind that it is subject to so much doubt, as to render it incumbent on the vendors either to shew that Mrs. G——— is barred of her dower by settlement, or to procure another fine to be levied. If I correctly understand the nature of Mr. ———'s objection, it is, that, as the fine of 1782 was levied for a particular purpose only, namely, that of making a mortgage, Mrs. G——— did not absolutely relinquish her right of dower, but that such right still subsists in equity, subject to the mortgage. But I submit that her legal right was completely gone by the fine, and that she could have had no relief in equity against the heir of her husband; and the case is stronger in favour of a purchaser. Her right of dower must be derived out of the seisin of her husband, and after the fine he had merely an equitable seisin; in respect of which it is clear that she *would not be dowable. I do not conceive that she can have any equitable right to dower, when her legal right is at end, unless upon the ground of fraud, dower being entirely a legal demand. I understand Mr. ——— to say, that

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unless the deed contained some expressions to shew that she meant absolutely to relinquish her right, it must be intended that she contemplated only a conditional surrender of it; but I think it is rather incumbent on her part to shew that there are some expressions controlling the legal operation of the fine, which was entirely to divest her of that right. All that she can be supposed to have contemplated is the possibility that her husband might redeem and take a reconveyance to himself in fee, in which case her right of dower would again attach on the estate, as incident to his seisin; but she could have no equitable right to compel him to redeem or take such conveyance. He had a complete control over the equity of redemption; he might have sold it without his wife's concurrence; and of course was competent to direct the conveyance to be made in what manner he pleased. It has been long settled, that when the husband makes a mortgage in fee, previously to the marriage, the wife is not dowable of the equity of redemption; and this case does not differ from that in principle. Nor do I see how the objection can be supported without shaking the rule, so well established, and on which so many titles depend, that a woman is not dowable of an equitable estate. If the question be put of what Mrs. G——— was to be endowed, the answer must be of the equity of redemption, which brings it to the point, whether a woman can in any case claim her dower out of an equity of redemption of a mortgage in fee; and that point does not appear to me to admit of any doubt. I therefore submit, with great deference for the opinion of Mr. ———, that Mrs. G——— is completely barred of dower by the fine in question." W. H.

The parties then agreed to refer the point to Mr. *Bell*, who gave the following opinion:—

Mr. *Bell's* opinion.

"I have perused this case and the opinions, and in my opinion the purchaser may safely take the title without another fine.

"There is no gentleman whose opinion deserves greater attention than his, from whom I have the misfortune to differ; but the cases to which he alludes are cases where the question was, whether the right to the *estate* had been changed by what had been done. The cases of dower seem to me to depend on a different principle. And from the case of *Radnor* v. *Vandebendy*, 1 Prec. Ch. 65, *S. C.* Show. 961, downwards, it seems to have been held sufficient to bar a claim of dower in equity, if a purchaser had got the legal estate, so as to have a legal bar of dower. Courts of equity seem not to have troubled themselves much how a person came by
[*176] the legal estate in such cases, provided he was a *purchaser and had got such estate, and there was no fraud, (as, if the legal right of the wife was obtained from her by fraud, that must always form an exception), but seem always to have considered *that* as a sufficient bar to any claim of dower in equity. The principle might originally have well been doubt-

ed, but is now so well established, that I think a Court of equity will never allow the least infringement of it.

Lincoln's Inn, Dec. 4, 1816."

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It should be observed, however, that the preceding observations only apply to mortgages in fee; for, where the mortgage is for years only, the wife is entitled to dower in the inheritance remaining in the husband, (subject to the mortgage), precisely the same as if, instead of her joining in the fine, the mortgage had been made before the coverture.

Distinction, where mortgage is for years only:

But it is necessary to return to the subject more immediately before us.

A deed in which a fine is covenanted to be levied to certain uses, is called a deed to *lead* the uses. A deed which is declaratory of the uses of a fine already levied, is stiled a deed to *declare* the uses; but as the fine and deed are regarded as one assurance, the priority or posteriority of the one or the other is not material. Where, therefore, a tenant in tail by lease and release conveys lands to certain uses, and covenants to levy a fine to those uses, the fine will work a discontinuance; *Doe* d. *Odiurne* v. *Whitehead*, 2 Burr. 704; though, if they had been regarded as distinct assurances, the lease and release would have created a base fee, and the fine have operated in confirmation of that estate. *Seymor's case*, 10 Rep. 96.

Distinction between deeds *leading* and deeds *declaring* uses.

Fine and deed regarded as one assurance;

Upon the same principle, a fine, and deed subsequently declaring the uses of it, have been held to operate in exercise of a power of revocation, instead of as an extinguishment of it. *Herring* v. *Brown*, 1 Vent. 368, 371; 2 Show. 185; and cases cit. Sugd. Pow. 4th edit. 67. Indeed, it is now well settled that the operation of the fine will, for all purposes, be governed and controlled by the deed declaring the uses, whether precedent or subsequent. *Puttenham* v. *Duncombe*, Dy. 157 b; Lord *Cromwel's case*, 2 Rep. 70; Earl of *Leicester's case*, 1 Vent. 278; *S. C. nom. Wigson* v. *Garrett*, T. Raym. 239; *Stevens* d. *Costard* v. *Winning*, 2 Wils. 219; Earl of *Jersey* v. *Deane*, 5 Barn. & Ald. 569; *Davies* v. *Bush*, 1 M'Cleland & Younge, 58.

May operate in execution of a power.

Much discussion has arisen on the question, whether the uses of a fine covenanted to be levied can be varied previously to its being levied. *The result of the resolution in the Countess of *Rutland's case*, 5 Rep. 258, from which the doctrine on this subject is derived, appears to be, 1*st*, That a deed declaring the uses of a fine to be levied, is directory only, and does not bind the estate, and may be varied by another agreement, or limitation of the use, of as high a nature as the previous deed, but not by averment only; 2*ndly*, that if the fine levied be not pursuant to the deed, as to time, quantity, &c. such averment may be received, to shew that the fine was levied to other uses (*a*); but 3*rdly*, that even in this case, if there

Whether a fine covenanted to be levied to certain uses can be levied to other uses.

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(*a*) But the statute of frauds *now* precludes the reception of parol evi-

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be no other limitation of the use, the fine will enure, notwithstanding the variance, to the uses contained in the indenture.

As to the concurrence of parties concerned in interest.

So far, the doctrine of the case admits of little question; but, in subsequent cases, the rule allowing the uses to be varied by the parties before the levying of the fine, has been qualified by requiring that all the parties *concerned in interest* should concur. See *Stapleton* v. *Stapleton*, 1 Atk. 7; but see *Jones* v. *Morley*, 2 Salk. 677, 4 Mod. 261, Com. Rep. 30, *S. C.* Thus, if A., seised in fee, covenant to levy a fine to B. in fee, it is admitted that, before the fine is levied, they may agree that it shall enure to other uses; but that if A. agree to levy a fine to the use of himself for life, remainder to his first and other sons in tail male, he cannot, it is thought, in respect of the interests covenanted to be given to the sons, change the uses. This qualification of the rule has been opposed by several writers, particularly by Mr. Preston, who has contended, with great reason, that, as the deed directing the uses does not bind the estate, the covenantor may, in breach of his covenant, if he chooses, convey the estate in a different manner, as well by another declaration of the uses of the fine, as by any other conveyance, leaving the parties damnified to their remedy on the covenant. 2 Prest. Conv. 18; see also Sugd. Gilb. 100. The point, however, seldom arises in practice, as it is admitted on all hands, that a fine once *levied* to certain uses, cannot be effected by a subsequent declaration of other uses.

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DEED DECLARING THE USES OF A FINE.

DEED *declaring the* USES *of a* FINE come ceo, &c. *levied by* HUSBAND *and* WIFE, *of an undivided Share in Remainder in Fee expectant on an Estate for Life,* TO SUCH USES *as they shall* APPOINT, *and in Default to the Husband during their joint Lives, and then as the* SURVIVOR *shall* APPOINT; *and in Default to the* SURVIVOR *in Fee.*

Parties.

THIS INDENTURE, made &c., BETWEEN [David Garrick], of &c., and [Eva Maria] his wife, of the one

dence, except in favour of the conusee, to rebut the resulting use; and the form in which covenants to levy fines are now usually framed, renders it scarcely possible that the case suggested in the text can occur.

part; and [Oliver Goldsmith], of &c., of the other part. WHEREAS [*testator*], late of &c., by his last will and testament in writing, bearing date on or about the —— day of ——, 1750, duly executed and attested so as to pass real estates, gave and devised unto [Mary], the wife of [Thomas Moore], of &c., ALL that *(copy parcels from will)*, *To hold* the same premises unto her the said [Mary Moore], and her assigns, for and during the term of her natural life; with remainder to the said [Thomas Moore] for and during the term of his natural life, and from and immediately after the decease of the said [Mary Moore] and [Thomas Moore], the said [*testator*] gave and devised three-fourth parts of the said premises unto [C. D.], [E. F.], and the said [Eva Maria], the wife of the said [David Garrick], (the three children of [James Thompson], of &c., and [Sarah] his wife), their heirs and assigns for ever, equally to be divided between and among them, as tenants in common, and not as joint-tenants; AND WHEREAS the said testator died on the —— day of ——, 1760, without revoking or altering his will; and the same was soon after his decease duly proved by [*executrix*] as sole executrix thereof, in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS the said [Mary Moore] died on the —— day of —— last, and was interred in the burial ground belonging to the parish church of *——, in the county of —— (*a*), leaving her husband the said [Thomas Moore], who is now living, surviving her. AND WHEREAS the said [D. G.] and [E. M.] his wife have, as of —— Term now last past, in due form of law, acknowledged before his Majesty's Justices of the Court of Common Pleas at Westminster, unto the said [O. G.] and his heirs, a fine *sur conusance de droit come ceo*, &c. (*b*), of

DEED DECLARING THE USES OF A FINE.

Recital of will creating the estate of the consors.

Recital of death of tenant for life;

[*179]

—of fine having been acknowledged.

(*a*) A reference to the time of death, and the place of burial, though not common in recitals of this kind, would be very useful in preserving a record of these facts, and often prevent great expense and trouble in searching parish registers, &c., in order to prove, after a considerable lapse of time, the death of the party.

As to mentioning place of burial, &c. in recitals of death.

(*b*) Although we have seen that a fine *sur concessit* or *de droit tantum*, is the species of fine properly applicable to reversionary interests; yet, fines *come ceo*, &c. are frequently levied where the reversion or the remainder

As to levying fines *come ceo*, &c. of reversions and remainders.

DEED DECLARING THE USES OF A FINE.

the one undivided third part of the said [E. M. G.], of and in the said three-fourth parts or shares of and in the said messuage or dwelling-house, lands, hereditaments and premises devised by the said recited will of the said [*testator*], by the description of "one-third of three-fourth parts of one messuage, one garden, —— acres of land, —— acres of meadow, and —— acres of pasture, with the appurtenances, in the parish of ——;" and which said fine is intended to be forthwith duly levied, and to be perfected with proclamations, but no use has yet been declared of the said fine. NOW THIS INDENTURE WITNESSETH, that it is hereby declared and agreed by and between the said parties hereto, that the said fine so acknowledged by the said [D. G.] and [E. M.] his wife, of the said one undivided third part devised as aforesaid to the said [E. M. G.], of and in the said three-fourth parts of the said messuage or dwelling-house, lands, hereditaments, and premises hereinbefore mentioned, shall, from and after the levying and perfecting thereof, operate and enure, and was, at the time of the acknowledgment thereof, intended to operate and enure, (subject nevertheless to the said life-estate *of the said [Thomas Moore] therein); and that every other fine already acknowledged or levied, or hereafter to be acknowledged or levied by or between the said parties, or either of them, of and concerning the said hereditaments, or any part thereof, shall (subject as aforesaid) operate and enure To SUCH USES and for such estate or estates, intents and purposes, as the said [D. G.] and [E. M.] his wife shall at any time, or from time to time, by any deed or deeds, to be executed by them in the presence of and attested by one witness or more, direct or appoint; and in default of such direction or appointment, To THE USE of the said [D. G.], and his assigns, during the term of the joint natural lives of himself and the said [E. M.] his wife, without impeachment for any manner of waste; And after

Testatum.

Declaration of the uses of the fine recited to be acknowledged.

[*180]

To such uses as covenantor shall appoint.

In default to the husband for their joint lives, with remainder

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(being vested as in fee: in which case the fine should be levied, as here, of the lands generally, without reference to the nature of the cognisor's interest: whose, however, will appear by the deed declaring the uses, and those uses will be limited subject to the existing estates; and fines of this nature may now, we have seen, fearlessly be levied even of a contingent remainder.

DEED DECLARING THE USES OF A FINE.

the determination of that estate by any means in the lifetime of the said [D. G.] and [E. M.] his wife, To THE USE of the said [O. G.] and his heirs, during the joint natural lives of the said [D. G.] and [E. M.] his wife; UPON TRUST to support the contingent remainder hereinafter limited, yet nevertheless to permit the said [D. G.] and his assigns to receive the rents and profits of the said hereditaments, *And* immediately after the decease of either of them the said [D. G.] and [E. M.] his wife, To SUCH USES, and for such estate or estates, intents and purposes, as the survivor of them the said [D. G.] and [E. M.] his wife, by any deed or deeds to be executed and attested as aforesaid, or by his or her last will and testament, or any codicil thereto, to be signed and published in the presence of and attested by three or more credible witnesses, shall direct or appoint (*a*); *And*, in default of *such direction or appointment, To THE USE of the survivor of them the said [David Garrick] and [Eva Maria] his wife, his or her heirs and assigns, for ever; *And* to or for no other use, intent, or purpose whatsoever.

To trustee to preserve contingent remainder; with remainder.

To such uses as the survivor shall appoint;

and in default, To the survivor in fee.

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(*a*) It is now settled (in conformity to the unanswerable reasoning of the learned author of the Treatise of Powers, Sugd. Pow. 4th edit. 340), that where an estate is limited to such uses as a man shall appoint, and, in default, to him in fee, the appointee under the power takes exclusively of the dower of the wife of the appointor; *Ray* v. *Pung*, 5 Barn. & Ald. 561; *S. C.* 5 Madd. 310; and, therefore, the present limitation is quite sufficient for the purpose of enabling the husband, if he should be the survivor, to dispose of the lands without the concurrence by fine of any future wife. How far it may be desirable to substitute this simple mode of limiting to uses to prevent dower, instead of that now in use, (see *ante*, Vol. III. p. 554), involves some other considerations, which will be the subject of a future note. Where the fee in default of appointment is vested in the donee, the power should be extended to appointments by will, otherwise the dowress's claim will not be excluded against a devisee.

Effect of a general power in excluding dower.

COVENANT TO LEVY A FINE SUR CONCESSERUNT OF LIFE ESTATES.

COVENANT *to Levy a Fine* sur concesserunt *of Life Estates of Husband and Wife, to the Use of the Covenantee* (*a*).

Parties.

THIS INDENTURE, made, &c., BETWEEN [*covenantor*], of &c., and [*wife*], his wife, of the one part; and

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How far it is desirable that a fine should be preceded by a conveyance.

(*a*) Where it is intended that a husband and wife shall levy a fine to a purchaser or mortgagee, it is usual to make them convey in the first instance, by lease and release, to the intended uses, and then they covenant, or rather the husband covenants, that they will levy a fine to those uses; but as the fine is itself an assurance, and vests the estate, by the operation of the statute of uses, in the *cestui que use*, the declaration of the uses of the fine is alone sufficient, and the expense of the lease (the whole of which is additional,) and release may be avoided. Sometimes, indeed, it is convenient that there should be a conveyance of the freehold by deed, as where terms are to be surrendered, &c. In other cases, the principal advantage in having a conveyance by lease and release is, that if the fine for any reason happen not to be levied, or to be in-operative, the conveyance will pass all the interest that is in the husband;—a reason which obviously applies with greater force where the inheritance is in him, than where it is in the wife, as his conveyance alone, in the latter case, would have a very limited operation; but in either case, as the purchaser or mortgagee will of course see that the fine has passed the King's Silver Office before he pays his money, (*sup.* p. 171), the risk of the non-completion of the fine seems not, in ordinary transactions at least, to warrant the additional expense. In the present instance, indeed, as the object may be supposed to be to enable the conusee to suffer a common recovery, the validity of which would depend upon the conveyance passing the immediate freehold, a practitioner might reasonably prefer a lease and release, in addition to the covenant to levy a fine, by which means the releasee would gain an estate of freehold *quâcunque viâ*. And it is worthy of observation, that some additional security from a precedent conveyance seems to arise from the doctrine, that a fine or recovery operates to confirm all preceding estates granted by the conusor or recoveror, though such fine, &c., be afterwards expressly levied to different uses. *Seymor's case*, 10 Rep. 95; *Cheney* v. *Hall*, Amb. 526; *Moody* v. *Moody*, Ib. 649;

Operation of fine to confirm preceding estates and charges.

[*covenantee*], of &c., their eldest son and heir apparent, of the other part. WHEREAS, by indentures of lease and release, bearing date, respectively, on or about the —— day of ——, 1790; (being the settlement executed previously to the marriage of the said [*covenantor*] and [*wife*], his wife); the release made between the said [*covenantor*], of the first part; the said [*wife*], by her then name and description of [*wife's name and description before marriage*], of the second part; and [*trustees*], of the third part; the said [*covenantor*] did, for the considerations in the said indenture of release mentioned, release and convey, or otherwise assure, unto the said [*trustees*], and their heirs, *(inter *alia)*, ALL that, &c., *(copy parcels from settlement)*, *To hold* the same premises unto the said [*trustees*], and their heirs, *To such uses* as therein mentioned, until the solemnization of the intended marriage; and after the solemnization thereof, *To the use* of him the said [*covenantor*], for the term of his natural life; with remainder *To the use* of the said [*wife*] for the term of her natural life; with remainder *To the use* of the said [*trustees*] during the life of the said [*wife*], *Upon trust* to preserve contingent remainders; with remainder to the use of the first and every other son of the said [*covenantor*] and [*wife*], his wife, successively, in the order of their respec-

COVENANT TO LEVY A FINE SUR CONCESSERUNT OF LIFE ESTATES.

Recital of marriage settlement creating the estates.

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Goodright d. *Tyrrell* v. *Mead*, 3 Burr. 1703. And where the releasee, to whom a fine was covenanted to be levied, died before it was levied, Lord *Kenyon* was of opinion, that a fine afterwards levied by the releasor to a third person operated as a confirmation. *Doe* d. *Gregory* v. *Whichelo*, 8 D. & E. 211. So, where a tenant in tail confesses a judgment, or makes a mortgage, or a lease not warranted by stat. 32 Hen. 8, and afterwards levies a fine, or suffers a recovery, this will confirm the title of the creditor or lessee. 2 Roll. Ab. 473; *Goddard* v. *Complin*, 1 Ch. Cas. 119; *Holbeach* v. *Sanbeach*, Winch, 102; 3 Atk. 276; 3 Bac. Abr. 314; see also *Symonds* v. *Cudmore*, Show. 340.

Assuming, therefore, that a person who has covenanted to levy a fine to certain uses, may, without the concurrence of the persons concerned in interest, afterwards levy the fine to different uses, (as to which *vide sup.* p. 177), it is clear that a releasee is in a better situation than a mere covenantee; but this case, for the reason before suggested (*sup.*), rarely happens.

COVENANT TO LEVY A FINE SUR CONCESSERUNT OF LIFE ESTATES.

And that the two tenants for life had agreed to convey their estates for life.

tive births, and the heirs male of the body of every such son, with remainders over. And whereas the said [*covenantee*] is the eldest son of the said [*covenantor*] and [*wife*], his wife; And whereas the said [*covenantor*] and [*wife*], his wife, in consideration of the said [*covenantee*] having concurred with them in suffering a common recovery of certain other lands and hereditaments, which were also subject to the limitations hereinbefore recited, to uses for the benefit of them the said [*covenantor*] and [*wife*], his wife, and of the natural affection which they bear to the said [*covenantee*], have agreed to convey the said messuage, farm, lands, tenements, and hereditaments hereinbefore described, unto and to the use of the said [*covenantee*], and his heirs, during the lives of the said [*covenantor*] and [*wife*], his wife, and the life of the survivor of them, for his and their own benefit absolutely.

Testatum.

Covenant by tenant for life that he and his wife shall levy a fine *sur concesserunt.*

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, the said [*covenantor*], for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said [*covenantee*], his heirs and assigns, that the said [*covenantor*] and [*wife*], his wife, (she hereby consenting) (*a*), shall and will, at

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As to the form of covenant by husband that his wife shall levy a fine.

Whether covenant can be enforced against the husband.

(*a*) As the husband cannot by his covenant bind his wife, the form in which this covenant is frequently expressed, namely, that the covenantor "for himself *and his wife*, his *and her* heirs," covenants, &c., is inaccurate, though there is no objection to *his* covenanting that *she* will perform the act as in the above form. See 2 Prest. Conv. 83. It has been a question much agitated, whether, where the husband contracts that his wife shall levy a fine of lands, a Court of equity will decree a specific performance of the contract against him, the effect of which of course would be, to send him to prison for contempt, unless he can prevail on his wife to enable him to perform the contract. On this subject, see *Otread* v. *Round*, 4 Vin. Ab. 202, pl. 4; *Harrington* v. *Horne*, 5 Ib. 546, pl. 35; *Winter* v. *Devereux*, 3 P. W. 189, n.; *Hall* v. *Hardy*, 3 P. W. 187; *Brick* v. *Whelley*, 9 Feb. 1721, cit. 1 Madd. 7, n.; *Daniel* v. *Adams*, Amb. 495; *Sedgwick* v. *Hargrave*, 2 Ves. sen. 57; *Stephenson* v. *Morris*, 7 Ves. 474; *Withers* v. *Pinchard*, cit. Ib. 475; *Emery* v. *Wase*, 5 Ves. 846; *S. C.* 8 Ves. 548. Lord *Eldon*, in the last case, expressed his disapprobation of the doctrine, that a specific performance can be enforced, the contract being contrary to the policy of the law, and its performance required by

COVENANT TO LEVY A FINE SUR CONCESSERUNT OF LIFE ESTATES.

their own proper costs and charges, as of —— term last past, or before the end of —— term now next ensuing, acknowledge and levy, before his Majesty's Justices of the Court of Common Pleas, at Westminster, one or more fine or fines *sur concesserunt*, with proclamations, in due form of law, unto the said [*covenantee*], and his heirs, of the said messuage, farm, lands, tenements and hereditaments, and all and singular other the premises hereinbefore described, and every part and parcel thereof, by such apt and convenient names, quantities, qualities, number of acres, and other descriptions, as shall be sufficient to comprise and ascertain the same, and as shall for that purpose be thought fit; by which said fine or fines the said [*covenantor*] and [*wife*] his wife shall and will grant the said messuage, farm, lands, and hereditaments, with *the appurtenances, unto the said [*covenantee*], and his [*185] heirs, *To have and to hold* the same unto the said [*covenantee*] and his heirs, for and during the natural lives of the said [*covenantor*] and [*wife*] his wife, and during the life of the survivor of them. *And* it is hereby agreed and declared between and by the said parties hereto, that the said fine or fines, so as aforesaid, or in any other manner, or at any other time or times, to be acknowledged and levied, and every other fine, conveyance, and assurance in the law whatsoever, heretofore had, made, levied, suffered, or executed, of the same messuage, farm, lands,

The said fine to enure to the use of the covenantee, during the lives of the said tenant for life and his wife.

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one who knew that he was accepting a covenant, the execution of which depended upon the concurrence of a third person, whom the covenantor could not and ought not to control. The argument on the other side generally is, that the husband makes use of the refusal of the wife, as a pretext for avoiding the contract. Considering the case, however, upon the principles referred to by Lord *Eldon* in *Emery* v. *Wase*, and that subsequent Judges have intimated their acquiescence in the opinion expressed by this distinguished and venerable Judge, (see Sir *James Mansfield's* judgment in *Davis* v. *Jones*, 1 New Rep. 269; and Sir *T. Plumer's* in *Howell* v. *George*, 1 Madd. 6), it is scarcely to be doubted that the determination of the Courts would now be in accordance with that opinion. The husband is, of course, liable to an action at law for breach of the contract, though the Courts are disposed not to encourage such actions. See *Davis* v. *Jones*, 1 New Rep. 269.

COVENANT TO LEVY A FINE SUR CONCESSERUNT OF LIFE ESTATES.

hereditaments, and premises, or any of them, or any part thereof, by or between the said parties to these presents, or any of them, or whereunto they or any of them are, is, or shall be, a party or parties, privy or privies, shall be and enure, and shall be adjudged, deemed, construed, and taken to be and enure To THE ONLY USE AND BEHOOF of the said [*covenantee*], his heirs, and assigns, during the lives of the said [*covenantor*] and [*wife*], his wife, and the life of the survivor of them (*a*), *And* to and for no other use, intent, or purpose whatsoever.

Variation in the case of a remainder.

(*a*) The form of the covenant is the same, whatever is the species of the fine to be levied; the terms descriptive of the conusor's interest being of course varied according to the nature of the interest. Where the subject is a reversion or remainder, the fine should be declared to enure To the use, &c. "in remainder or reversion immediately expectant on the decease of the said A." (or otherwise as the case may be), "and in the meantime subject to his life estate or interest therein."

For other forms of deeds leading and declaring the uses of fines, see the heads "MORTGAGE" and "PURCHASE DEED," *post*, and the title "FINES" in the General Index.

As to the stamp-duty on deeds declaring the uses of fines.

The stamp-duty to be affixed to deeds declaring the uses of fines, of course depends upon the nature of the transaction. If the fine be levied on the occasion of a mortgage or purchase, or for any other purpose requiring an *ad valorem* stamp, such duty will be payable; otherwise a common deed stamp will be sufficient.

ENTRY TO AVOID A FINE.

FORM *of* ENTRY *into Lands to avoid a Fine.*

I, A. B. of ——, in the county of ——, yeoman, as heir-at-law of [C. D.], late of ——, in the said county, spinster, deceased, who died intestate, do make entry in and upon the lands and hereditaments, late the estate and inheritance of the said [C. D.], deceased, in the parish of ——, in the said county, and I claim and demand to be entitled to the same, and the possession thereof, as her heir-at-law: and I make such entry, claim, and demand, as and in the

ENTRY TO AVOID A FINE.

name of all the lands, tenements, and hereditaments in the county of ——, to which I have a right of entry, and of which the said [C. D.] died seised or otherwise entitled to. *And* I do declare that such entry, claim, and demand, is and are made as such heir-at-law as aforesaid, and also to avoid any and every fine and fines, common recovery and common recoveries, (if any), levied or suffered of the same lands, tenements, or hereditaments, or any of them, late the estate and inheritance of the said [C. D.] deceased, as aforesaid, and to avoid the effect and operation of any and every fine or fines, common recovery or common recoveries, (if any), levied or suffered thereof as aforesaid, and all statutes of limitation.

The said [A. B.] entered and made claim in the above words in our presence—
[E. F.]
[G. H.]
[I. J.]
[K. L.]

The mark † of [A. B.],
June 12, 1829.

POWER *of* ATTORNEY *to make an Entry to avoid a Fine.*

POWER OF ATTORNEY TO MAKE ENTRY TO AVOID A FINE.

KNOW ALL MEN BY THESE PRESENTS, that I, [A. B.], of ——, in the county of ——, yeoman, heir-at-law of [C. D.], late of ——, in the said county, spinster, deceased, who died intestate, have made, constituted, and appointed, And by these presents do make, constitute, and appoint [E. F.], of ——, in the county of ——, [G. H.], of ——, in the county of ——, [I. J.], of ——, in the county of ——, and [K. L.], of ——, in the county of ——, jointly and severally, and any one, two, or more of them, my true and lawful attornies and attorney, for me and in my name, and on my behalf, to make one or more entry or entries, in and upon all the lands, tenements, and hereditaments, of or to which the said [C. D.], deceased, was seised or entitled, situate and being in the parish of

POWER OF ATTORNEY TO MAKE ENTRY TO AVOID A FINE.

——, in the said county of ——, or there and elsewhere in that county, or any part or parts thereof in the name of the whole or otherwise, and to claim and demand the same. *And* I hereby authorize and empower my said attornies, jointly and severally, and any one, two, or more of them, to make such entry or entries, and such claim and demand, as and in the name of all and every or any of the lands, tenements, and hereditaments, in the county of ——, to or upon which I have a right of entry, or whereof or whereto the said [C. D.] died seised or entitled. *And* I do authorize and empower such entry or entries, and such claim and demand so to be made as aforesaid, for any and every purpose for which the same may rightfully be made, and particularly for the purpose of avoiding, and with the intention to avoid any and every fine and fines, (if any), levied or suffered of the said lands, tenements, and hereditaments, or any of them, or any part or parts thereof, and to avoid the effect and operation of any and every such fine or fines, (if any), and all statutes of limitation. *And* I authorize and empower my said attornies, jointly and severally, and each or any or either of them, generally, for me and in my name, and on my behalf, to do, perfect, and execute all and every lawful acts, matters, and things whatsoever, which shall be or to him or them appear requisite, necessary, or expedient, in or about the premises, or any part thereof, or respecting the same, as fully and effectually, to all intents and purposes, as I myself might or could doif personally present, and I hereby ratify, allow, and confirm, all and whatsoever my said attornies or attorney, all, any, or either of them, shall or may lawfully do, or cause to be done, therein, or in relation thereto, under or by virtue of these presents. IN WITNESS, &c.

ENTRY TO AVOID A FINE.

FORM *of* ENTRY *to avoid a Fine by virtue of the Power contained in the last Precedent.*

WE, [E. F.], of &c., [G. H.], of &c., [I. J.], of &c., [K. L.], of &c., do hereby, as the attornies for and in the

ENTRY TO AVOID A FINE.

name, and on the behalf, of [A. B.], of ——, in the county of ——, yeoman, as heir-at-law of [C. D.], late of ——, in the said county, spinster, deceased, who died intestate, make entry in and upon the lands and hereditaments, late the estate and inheritance of the said [C. D.], deceased, in the parish of ——, in the said county of ——, and as such attornies we claim and demand that the said [A. B.] is entitled to the same, and the possession thereof as her heir-at-law: and we make such entry, claim, and demand, as and in the name of all the lands, tenements, and hereditaments, in the county of ——, to which the said [A. B.] has a right of entry, and of which the said [C. D.] died seised, or otherwise entitled to. *And* we do declare, that such entry, claim, and demand, is and are made in the name, and on the behalf of the said [A. B.], as such heir-at-law as aforesaid, and also to avoid any and every fine and fines, common recovery and common recoveries, (if any), levied or suffered, of the same lands, tenements, or hereditaments, or any of them, late the estate and inheritance of the said [C. D.] deceased, as aforesaid, and to avoid the effect and operation of any and every fine or fines, common recovery or common recoveries, (if any), levied or suffered thereof as aforesaid, and all statutes of limitation.

[E. F.],
[G. H.],
[I. J.],
[K. L.].

June —, 1829.

FORFEITURE.

ASSURANCES BY PERSONS CHARGED WITH FELONY, &c., WITH A VIEW TO PREVENT ESCHEAT AND FORFEITURE.

Conveyances to prevent forfeiture.

CONVEYANCES and assignments are sometimes executed by prisoners charged with treason or felony, in order to elude the forfeiture consequent on attainder or conviction. To ascertain how far contrivances of this kind are effectual, it will be necessary briefly to take a view of the law of forfeiture.

Forfeiture for high treason.

Estates tail.

At common law, or by statute, persons attainted of high treason forfeit to the king the lands and hereditaments of which they were seised for life, or for "any estate of inheritance, (which has been held to extend to estates tail), in use or possession, at the time of such treason committed, or any period after;" (see stat. 26 Hen. 8, c. 13; 33 Hen. 8, c. 20; 25 Edw. 3, c. 2; 7 Rep. 34 b; 1 Hale's Pl. Cr. 251); and by stat. 5 & 6 Edw. 6, c. 11, the wife of a traitor loses her dower. See 3 Inst. 19. As

Equitable interests.

the stat. 26 Hen. 8, expressly embraces uses before the statute (of uses), it should seem, by analogy, that it extends to equitable interests since the

Powers of revocation.

statute. 1 Hal. P. C. 248, but see Cro. Jac. 513. The stat. 33 Hen. 8, has been held to include powers of revocation, where the revocatory act might be performed by *any* person, as the tender of a ring, &c.; but not where it is personal, as in the case of a power required to be executed by deed under hand and seal, or the like. *Wheeler* v. *Smith*, 1 Hal. P. C. 246. Lands of inheritance held *jure uxoris* are forfeited during the coverture only. 3 Inst. 19; 1 Hal. P. C. 251.

By stat. 7 Ann. c. 21, the disinherison of heirs on account of treason is limited to the period of the death of the Pretender, which was extended by stat. 17 Geo. 2, c. 39, to that of his sons; but these statutes have been repealed by statute 39 Geo. 3, c. 93, which seems to have been overlooked by the respectable editor of the last edition of Hawkins's Pleas of the Crown (see Curwood's Hawk. P. C. 637, 649, n.), who states that as Cardinal York, the last of the Pretender's sons, is dead, forfeiture in the case of treason has ceased.

Forfeiture and escheat for felony.

On attainder for felony, the offender forfeits the profits of his lands during his life to the king, and for a year, day, and waste, which are now usually compounded for, (see 4 Bl. Comm. 386); and subject to this for-

CONVEYANCES TO AVOID ESCHEAT, &c. ON ATTAINDER.

feiture the inheritance in fee (unless the lands be gavelkind) escheats to the lord, (who in the case of freeholds is also generally the king), in consequence of the corruption of blood which ensues from attainder. But this consequence is now taken away, except in certain cases, by stat. 54 Geo. 3, c. 145, which enacts "that no attainder for felony, which shall take place from and after the passing of this act, save and except in cases of high treason, or of the crimes of petit treason or murder, or of abetting, procuring or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only; and that it shall be lawful for every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained, if no such attainder had been, to enter into the same." As this statute saves the right of the heir, without restoring the capacity of the offender, the result seems to be, that in the cases which fall within its operation, the lands descend to the heir, unaffected by the testamentary disposition of their ancestor.

Stat. 54 Geo. 3, c. 145. No attainder, except for treason or murder, to extend to the disinheriting of any heir, &c.

As to estates tail of felons.

Where the person attainted of felony was tenant in tail, the land was (even before the late statute), forfeited only for the life of the offender, except that the king had his year, day, and waste against the issue, as he had against the wife, where the felon was seised *jure uxoris;* 1 Hal. P. C. 360; and it is apprehended that the late statute, though it expressly confines the penal consequences of felony, in respect of forfeiture, to the life of the offender, has not in any case taken away the king's year, day, and waste, the king not being named. See 11 Rep. 74.

Effect of tenant in tail levying a fine after a felony.

Where a tenant in tail, after the offence and before attainder, levies a fine, it has been said that the fine shall bar the issue for the lord's benefit; Harg. & Butl. Co. Litt. 2. b., n. (10); but it should seem that this would only apply where the uses were limited, or, for want of declaration (*vide sup.*), resulted, to him in fee. See *Stevens* d. *Costard* v. *Winning*, 2 Wils. 219.

As to copyhold lands.

It should be observed, in regard to copyhold lands, that, upon the attainder of a copyholder, as well for high treason as for felony, the lands escheat to the lord, and are not forfeited to the king; for, notwithstanding the general terms of several of the statutes which give the lands of persons attainted of high treason to the king, they do not extend to copyholds, which are not within acts of Parliament that tend to the prejudice of the lord, unless expressly named. 1 Sid. 435; Lord *Cornwallis's* case, 2 Vent. 38; and see 1 Watk. Copyh. 341; Scriv. Copyh. 321. Copyholds are not forfeited without attainder, unless by special custom. *King* v. *Willes*, 3 B. & A. 511.

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No escheat of rents, trust-estates, &c.

*Escheat, being a consequence of the feudal relation, applies only to those things that lie in tenure, and is not applicable therefore to rents,

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commons, &c. So that, if the owner of a fee-farm rent in fee be attainted of murder, the rent is extinguished, (subject to the forfeiture to the king during the life of the offender); for the lord has no claim by escheat, for the reason just given; and it cannot descend, on account of the corruption of blood. 2 Curw. Hawk. P. C. 637.

Destination of equitable interests in case of the attainder of the owner.

And the same rule applies to trust estates; for, as escheat arises *ob defectum tenentis*, it is clear that this can only apply to the legal owner, who is the person to perform the lord's services. Where, therefore, on account of the failure of heirs, from the corruption of blood or other cause, there is no person to claim the equitable ownership, it seems that the trustee is entitled to hold the land discharged of the trust. See *Pawlett* v. *Attorney-General*, 1 Sid. 465; *Attorney-General* v. *Sands*, Id. 488; *Burgess* v. *Wheate*, 2 Ed. 177; *Williams* v. Lord *Lonsdale*, 3 Ves. 752; and a term assigned to attend the fee is regarded as part of the inheritance. Sir *George Sand's case*, 1 Sid. 405, 488; *S. C.* Hard. 495. See also 1 Vern. 357. So, the attainder of the surrenderee of copyholds before admittance produces no forfeiture to the lord. *Roe* d. *Jeffereys* v. *Hicks*, 2 Wils. 13.

Where a trustee is attainted of felony.

In the converse case, *i. e.* where the owner of a legal estate, subject to a trust for the benefit of others, is attainted of a felony, on which corruption of blood ensues, the land escheats; and as the lord in such case claims by title paramount, he takes discharged of the trust; Jenk. Cent. 190, pl. 192; *Pimb's* case, Moor. 196; Harg. & Butl. Co. Litt. 13. a. n. (7); and where the seignioral right is in the Crown, for the additional reason, that the Crown could not have been seised to a use before the statute (see 22 Vin. Ab. 181), and cannot now be compelled to execute a trust. It is clear, however, at this day, that the Crown would not hold the property against the *cestui que trust* (*a*).

Forfeiture of goods and chattels.

Traitors and felons also forfeit to the king their goods and chattels real and personal, (which extends to terms of which they are possessed in

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King may grant lands forfeited, &c. by sign manual.

(*a*) By several statutes, 39 & 40 Geo. 3, c. 88; 47 Geo. 3, sess. 2, c. 24; 59 Geo. 3, c. 94, the king is enabled, by sign manual, or under the seal of the Duchy of Lancaster, to grant lands devolving upon the Crown by escheat or forfeiture, or from having been purchased by or in trust for an alien, for the purpose of executing any trusts to which they may have been directed to be applied, or of restoring the same to the family of the persons whose estates they had been, or to carry into effect any intended disposition of such persons, or to reward persons making discovery of such forfeiture, &c., or to direct the lands to be sold, and the rents or the produce of the sale to be applied to these purposes, or to pay any debt or debts of the persons whose estates they had been. The provisions of these statutes have lately been extended to leaseholds. See stat. 6 Geo. 4, c. 17.

right of their wives, 1 Hal. P. C. 251), and, indeed, all their personal estate of every denomination, whether the interest be legal or equitable, in possession or action; Cro. Jac. 513; 1 Sid. 405; but, between the forfeiture of goods, and the forfeiture and escheat of lands, there is this material difference: goods are forfeited upon *conviction;* lands upon *attainder;* and the forfeiture of lands (and to *some* purposes indeed, that of goods), has relation back to the time of the offence; Perk. 6, pl. 28; *Dame Hale's case*, Plowd. Comm. 263; 2 Vent. 39; Co. Litt. 392; 2 Curw. Hawk. P. C. 645; 3 Bac. Ab. 271; except as to the mesne profits, which are forfeited from attainder only; Plow. 488; S. P. 8 Rep. 170; and it is to be observed that, in the case of murder, the relation is to the act from which death ensues, and not to the death. 2 Hal. P. C. 179.

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A person is said to be attainted, upon whom judgment of death is passed; and in those felonies, therefore, in which no such judgment takes place, as in the case of a *felo de se*, or a person killed in rebellion, &c., the personal estate alone is forfeited. 1 Hal. P. C. 413; *Steven's case*, Cro. Car. 566.

Attainder, what.

It is clear, that both traitors and felons may, before conviction, *bonâ fide* sell their chattels real and personal for the maintenance of themselves and their families; 8 Rep. 171; 2 Curw. Hawk. P. C. 645; 3 Bac. Ab. 272; and may, it seems, apply the mesne profits of their lands, before attainder, to the same purpose; Co. Litt. 390. b.; and, according to the opinion of an eminent writer, an alienation even of lands, free from fraud, and which, after the crime committed by the tenant, shall give a tenant to the lord to perform the services, will intercept and prevent the title of the lord, under the doctrine of escheat. 3 Prest. Abst. 392. No authority, however, is cited for this position, which is at variance with the doctrine of all the writers on this subject, (*sup.*), particularly of Sir Matthew Hale, who distinctly lays it down, in respect as well of escheat as forfeiture, that the attainder has relation to the time of the offence committed, so as to avoid all mesne estates and incumbrances. See 1 Hal. P. C. 360, 426; 2 Id. 179.

Bonâ fide alienation, where good

At all events, it is clear, that conveyances of lands, made with a view to elude forfeiture, are fraudulent and void; see stat. 13 El. c. 5, stated *infra;* and such unquestionably would be the fate of any voluntary settlement made by a person charged with felony, on any of the members of his family, though antedated or otherwise ingeniously contrived, for the purpose of avoiding the forfeiture; which rule applies as well to goods as to lands, as appears by several decisions.

Conveyances to elude forfeiture, illegal.

Thus, in *Jones* v. *Ashurt*, Skinn. 357, where an action of trover was brought against the Sheriff of London, it appeared that the plaintiff's father, who had been executed for robbery and burglary, being in Newgate, and his goods being seised by the defendant, made a bill of sale thereof, to the intent to make provision for the plaintiff, his son; and *Holt*, C. J., held it to be fraudulent; for though a sale *bonâ fide*, and for valua-

Bill of sale of goods by a felon held to be void.

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ble consideration, had been held good, because the party had a property in the goods till conviction; yet such a conveyance as this could not be intended to any other purpose than to prevent a forfeiture, and defraud the king.

Insertion in the deed of an adequate consideration, not conclusive.

And the introduction into the deed of a consideration adequate to support it, will not avail, without actual proof of such a consideration having passed between the parties.

Thus, in *Shaw* v. *Bran*, 1 Stark. 319, it appeared that a person named Evans, whilst in confinement on a charge of felony, had executed a deed of assignment of his property to the plaintiff. The deed recited that Evans was indebted to the plaintiff, who was a coal-dealer, in the sum of 70*l.*, and also to another person of the name of Smith, in the sum of 17*l.*; and that Evans was entitled to certain property in the possession of Bran, (the defendant), a peace officer, and to other property specified in the schedule annexed to the deed. And by this deed, Evans did bargain, sell, assign, and set over the property lately seized and taken possession of by Bran, and all other his property, whether in his own custody or in that of any other person whatsoever, mentioned in the schedule, in trust to sell such as did not consist of money, and to pay the costs of the assignment, &c. and to pay the debts due from Evans to Shaw and Smith. It also appeared that Evans had purchased a horse from Shaw, for the sum of 30*l.*, in payment for which he had given his bill for 48*l.*; Shaw had afterwards signified to Evans that he was dissatisfied with the bill, but it did not appear that the bill had been dishonoured. Evans was capitally convicted. Lord *Ellenborough*—"I am of opinion that this deed, executed as it was by the party on the eve of his trial for a capital offence, of which he was afterwards convicted, cannot be supported *without proof of the consideration*. If there had been a good consideration, the assignment would have been valid, although the object was to avoid a forfeiture. A transaction of this nature is to be regarded with a considerable degree of jealousy. I should have expected satisfactory proof of the debt from Evans to Shaw. Some evidence has been given on the subject of the debt. It appears that Evans had purchased a horse from Shaw, and that he gave him a bill of exchange in payment, upon which some suspicion was cast, but it does not appear that it was ever dishonoured; with respect to the debt to Smith, such a debt is recited in the deed, but there is no proof of it. If nothing more had appeared as to the debt to Shaw than the recital in the deed, the case might have been attended with some difficulty (*a*); but that difficulty no longer exists, since

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(*a*) But if the recital was insufficient as to Smith without extrinsic evidence, would it not have been equally inefficacious as to Shaw?

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the debt has been disproved by the evidence." Proof was afterwards offered of the debt from Evans to Smith to the amount of 17*l.*, which was objected to, as the plaintiff had closed his case; and his Lordship was inclined to think that the fact would not make any difference in a case which he was disposed to view with much jealousy.

As to securing personal property from forfeiture.

It is clear, therefore, that the only effectual mode of rescuing even the personal property of a felon from forfeiture, is by a *bonâ fide* sale or alienation for a valuable consideration antecedently to conviction. This, of course, may be made to a member of the family; but as such a transaction would be viewed with much jealousy, the actual payment of the consideration money should be proved by the most unexceptionable testimony.

As to settlement of real estate.

In regard to *real* estate, nothing effectual can be done; but as parties, in these unhappy cases, not unfrequently choose at all events to make the attempt of evading forfeiture by a settlement, as well of real as of personal estate, in the hope of eluding investigation, it has been thought advisable to furnish two precedents of deeds of this kind, which, under some modification, were prepared by a gentleman of eminence, in the case of a trader of considerable property, who was charged with felony, but who was subsequently acquitted. The Editor has the less hesitation in giving insertion to these forms, than he would otherwise have had, considering the inefficacy of the scheme, inasmuch as the provisions they contain are likely to be found useful for family settlements on other occasions.

Reference to sources of information.

For further information respecting forfeiture for crimes, see the title "Forfeiture," in Comyn's Digest, the Abridgments of Viner and Bacon, and Hale's and Hawkins's Pleas of the Crown. The preceding observations have been studiously confined to points of practical utility.

SETTLEMENT OF LANDS AND STOCK IN TRADE BY A PERSON CHARGED WITH FELONY.

RELEASE *in Fee, and* ASSIGNMENT *of* LANDS *and* STOCK IN TRADE, *by a Person* COMMITTED FOR FELONY, *to his* ELDEST SON, *upon certain* TRUSTS, *for the Benefit of the Grantor's* WIFE *and* CHILDREN; *with Covenant by the* ELDEST SON *to admit the* SECOND SON *into* PARTNERSHIP *with him at his Majority.*

Parties.

THIS INDENTURE, made the —— day of ——, 18—(*a*), BETWEEN [*grantor*] and [*wife*], his wife, of the first part; [*eldest son*] (who is the eldest son of the said [*grantor*] by the said [*wife*], his wife), of the second part; and [*second son*] (who is the second son of the said [*grantor*] and [*wife*], his wife, and an infant of the age of —— years or thereabouts), of the third part: WHEREAS the said [*grantor*] is seised of or entitled to the freehold messuages or tenements, workshops, offices, outhouses, and hereditaments hereinafter described, and intended to be hereby released, and the inheritance thereof in fee-simple: AND WHEREAS the said [*grantor*] hath for some years past carried on the trade or business of a timber merchant in or upon the said messuages or tenements, outhouses, offices, and workshops, and the said [*grantor*] is also possessed of, or entitled to, considerable stock and effects in his said trade or business: AND WHEREAS the said [*grantor*] is desirous of retiring from the said trade or business so by him carried on as aforesaid, and of relinquishing the same to or in favour of the said [*eldest son*], subject to such provision to be made thereout for the other children of the said [*grantor*], as hereinafter mentioned; *And* the said [*grantor*] hath therefore proposed and agreed to con-

Recitals that [*grantor*] is seised.

That he has carried on the business of carpenter, &c. and is possessed of stock, &c.

Desire to retire from business in favour of son and other children, &c.

(*a*) The deed should of course be dated antecedently to the offence charged.

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vey and assure the said messuages or tenements, workshops, offices, outhouses, and hereditaments, hereinafter described, and to transfer, assign, and make over all and every the stock and effects, implements, utensils, wares, merchandizes, goods, articles, and things of him the said [*grantor*], in and about his aforesaid trade or business, and by him used and employed in, or in anywise requisite or necessary for, the carrying on the same, unto the said [*eldest son*], his heirs, executors, administrators, and assigns respectively, upon, under, and subject to the trusts, restrictions, terms, and declarations hereinafter declared concerning the same. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said proposal and agreement, and in consideration of the premises; and also in consideration of the natural love and affection which the said [*grantor*] hath and beareth to the said [*wife*] his wife, and the said [*eldest son*], and his other children; and also for and in consideration of the sum of 5*s.* of lawful money of Great Britain, to the said [*grantor*] in hand paid by the said [*eldest son*] at or before the execution of these presents, the receipt whereof is hereby acknowledged, he the said [*grantor*] *Hath* granted, bargained, sold, aliened, released, and confirmed, *And* by these presents *Doth* grant, bargain, sell, alien, release, and confirm unto the said [*eldest son*], (in his actual possession, &c.), and to his heirs and assigns, ALL THAT *(insert parcels)*; TO HAVE AND TO HOLD the said messuages or tenements, workshops, hereditaments, and all and singular other the premises hereby released, or intended so to be, with the appurtenances, unto the said [*eldest son*], his heirs and assigns, for ever: TO THE ONLY USE AND BEHOOF of the said [*eldest son*], his heirs and assigns, for ever; Nevertheless, upon [and for] the several trusts, [intents, and purposes] hereinafter declared [concerning the same]. AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said recited agreement, and for the considerations aforesaid; And also in consideration of the further sum of 5*s.* of like lawful money to the said [*grantor*] in hand paid by the said [*eldest son*], at or before the execution of these presents, the receipt whereof is hereby acknowledged, he the said [*grantor*] *Hath*

Testatum.

Release of the freeholds.

Habendum.

To the use of the eldest son in fee, upon trusts.

Further *testatum.*

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granted, bargained, sold, assigned, transferred, and set over, *And* by these presents *Doth* grant, bargain, sell, assign, transfer, and set over, unto the said [*eldest son*], his executors, administrators, and assigns; ALL AND SINGULAR the stock, goods, and effects whatsoever, of him the said [*grantor*], in the said trade or business so by him carried on as aforesaid, and in every or any part and branch thereof; and all and singular wares, merchandizes, implements, utensils, articles, and things whatsoever, of him the said [*grantor*], belonging or appertaining to the said trade or business, or any part or branch thereof, or therein used or employed; *Together* with all benefit and advantage to be had or derived from or acquired by the said trade or business, and full liberty, power, and authority to use, exercise, and carry on the same trade or business, and every or any branch or part thereof; *And* all the estate, right, title, claim, property, and demand whatsoever, of him the said [*grantor*], in, to, or out of the same premises, and every of them, and every part thereof; (*Save and except*, nevertheless, and always reserved out of this present bargain, sale, transfer, and assignment, all such sum and sums of money as are now due and owing unto him the said [*grantor*], from or by any person or persons whomsoever, for and in respect of the said trade or business so by him carried on as aforesaid, or any part thereof); TO HAVE, HOLD, RECEIVE, AND TAKE the said stock, goods, and effects, wares, merchandizes, implements, utensils, articles, and all and singular other the premises hereinbefore mentioned, and intended to be hereby bargained, sold, and assigned as aforesaid, unto and by the said [*eldest son*], his executors, administrators, and assigns, as and for his and their own goods and chattels absolutely; *But nevertheless*, upon [and for] the trusts, [intents, and purposes] hereinafter declared [concerning the same]. AND *it is hereby agreed and declared* between and by the said parties hereto, that the said trade or business intended to be hereby assigned or made over as aforesaid, shall henceforth, during the continuance of the trusts hereinafter declared, and until the same shall be fully performed and satisfied, be [managed, carried on, and] conducted by the said [*eldest son*], his executors or administrators, upon or

Assignment of the stock, &c.

Except debts owing to the grantor.

Habendum unto [*eldest son*];

Upon the trusts after declared.

Business to be carried on by [*eldest son*].

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within the said messuages or tenements, workshops, outhouses, and hereditaments hereinbefore mentioned, and intended to be hereby released; And that such messuages or tenements, workshops, outhouses and hereditaments, shall be exclusively appropriated for that purpose; And also that it shall be lawful for the said [*eldest son*], his executors and administrators, to employ all such clerks, servants, collectors, agents, and other persons as he or they shall think proper and necessary to be employed in the carrying on or assisting him the said [*eldest son*], his executors or administrators, in the carrying on the same trade or business. AND AS TO, FOR, AND CONCERNING, as well the said messuages or tenements, workshops, offices, outhouses, and hereditaments hereinbefore mentioned and described, and intended to be hereby released and assured, as also the said stock, goods, and effects in trade, wares, merchandizes, implements, utensils, and premises, intended to be hereby bargained, sold, and assigned as aforesaid, together with the gains and profits to arise from and be acquired by the said trade or business so to be carried on by the said [*eldest son*], his executors or administrators as aforesaid; *It is hereby agreed and declared* between and by the said parties hereto, that the said [*eldest son*], his heirs, executors, administrators and assigns respectively, shall and do stand seised and possessed of, and interested in the same respectively; upon [and for] the trusts, [intents, and purposes] hereinafter declared [concerning the same]: that is to say, UPON TRUST that he the said [*eldest son*], his executors and administrators, shall and do, by, with, and out of the gains and profits of the said trade or business, in the first place, pay and satisfy the salaries and wages of the several clerks, servants, collectors, and other persons to be employed by him, the said [*eldest son*], his executors or administrators, in or about the said trade or business as aforesaid, and in carrying on the same; and all other costs, charges and expenses to be incurred, and which he the said [*eldest son*], his executors or administrators, shall be put unto or sustain in carrying on the same trade or business, and in the execution of the trusts hereby in him or them reposed. AND UPON FURTHER TRUST that he the said [*eldest son*], his executors or administrators,

Declaration of trusts.

Out of the profits of the trade to pay wages.

Next, to raise 300*l.* a year for the wife during

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shall and do, in the next place, yearly, and every year henceforth, until [*second son*], the second son of the said [*grantor*], shall attain his age of twenty-one years, or shall die under that age, if the said [*wife*], the wife of the said [*grantor*], shall so long live, but no longer or otherwise, by, with, and out of the gains and profits of the said trade or business, so to be carried on as aforesaid, in case the same shall be sufficient for that purpose, but if not, *then* by mortgage, sale, or other disposition of the said messuages or tenements, hereditaments, stock, goods, and effects, and premises, or of a competent part or parts thereof, levy and raise the clear yearly sum of 300*l.*, of lawful money of Great Britain, free from and without any deduction whatsoever, by quarterly payments, on the —— day of ——, by equal portions in every year; And shall and do pay such yearly sum of 300*l.*, as and when the same shall be raised as aforesaid, by quarterly payments, unto such person or persons, for such intents and purposes, and in such manner as she the said [*wife*], the wife of the said [*grantor*], shall by any note or writing under her hand, from time to time direct or appoint; *And,* in default of such direction or appointment, into the proper hands of the said [*wife*], for her sole and separate use and benefit, independent of the said [*grantor*], her husband, and not to be subject to his debts, control, or engagements; [And for the payment of which yearly sum of 300*l.* the receipts of the said [*wife*], or of her appointee or appointees, shall alone be a sufficient discharge. PROVIDED ALWAYS, that, from and after the said [*second son*] shall attain his age of twenty-one years, or from and after the decease of either of them the said [*eldest son*] and [*wife*], previously to his the said [*second son's*] having attained his age of twenty-one years, *Then*, and in either of the said cases, the aforesaid yearly sum of 300*l.* shall thenceforth cease and determine: *And subject* and without prejudice to the trusts aforesaid, UPON FURTHER TRUST, that he the said [*eldest son*] shall and do every year, until [*third son*], the third son of the said [*grantor*], shall attain his age of twenty-one years, or shall die under that age, but no longer, by the ways and means and in manner aforesaid, raise and levy the clear yearly sum of 150*l.* of lawful money of Great Britain, free from

the minority of the second son;

For her separate use.

When the second son attains twenty-one, or dies, the annuity to cease.

Also to raise 150*l.* a year for the third son;

and without any deduction whatsoever, by half yearly payments, on the —— day of ——, and —— day of —— in each and every year, by even and equal portions; *And* shall and do, from time to time, lay out and invest such yearly sum of 150*l.* as and when the same shall become due and payable, in the names of him the said [*eldest son*], his executors or administrators, and of such other persons or person as he or they shall for that purpose nominate and appoint, in the public stocks or funds of Great Britain, or upon Government or real securities at interest in England, *In trust* for the said [*third son*], and to be an interest vested in him at his age of twenty-one years; the first half yearly payments of the said several sums of 300*l.* and 150*l.* respectively, to begin and be made on the —— day of —— now next ensuing the date hereof; *And* subject and without prejudice to the trusts aforesaid, UPON FURTHER TRUST that he the said [*eldest son*], his heirs, executors and administrators, shall and do in the meantime, until the said [*second son*] shall attain his age of twenty-one years, or shall die under that age, retain and keep the residue or surplus of the said gains and profits which shall not be applied in and about the performance of the trusts aforesaid, to and for his and their own use and benefit absolutely. AND UPON FURTHER TRUST that he the said [*eldest son*], his heirs, executors, administrators and assigns, shall and do, from and immediately after the said [*second son*] shall attain his age of twenty-one years, stand seised and possessed of, and interested in, the said messuages or tenements, workshops, and hereditaments, stock, goods, and effects in trade, implements and utensils, together with the said trade or business, or other the trust premises, (subject nevertheless to the payment of the said yearly sum of 150*l.* hereinbefore directed to be raised for the said [*third son*] as aforesaid,) in trust for them the said [*eldest son*] and [*second son*], equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants, and their respective heirs, executors, administrators and assigns, for ever; and to be conveyed, assigned, assured, and disposed of, from time to time, as they shall respectively for that purpose direct or appoint. AND the said [*eldest son*], for himself, his heirs, execu-

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To be invested in the public funds, &c.

Eldest son to take the residue of the profits to his own use.

When the second son attains twenty-one, then to be interested jointly with him.

Eldest son to

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take the second son into partnership.

tors, and administrators, doth hereby covenant, promise, and agree, to and with the said [*grantor*], his executors and administrators, That he the said [*eldest son*] shall and will, in case the said [*second son*] shall attain his age of twenty-one years, at the request of the said [*second son*], admit him into copartnership with him the said [*eldest son*], in the trade or business so intended to be hereby relinquished and assigned to him the said [*eldest son*], as aforesaid, and all benefit and advantage thereof from the time of the said [*second son's*] having so attained his said age of twenty-one years, for and during the then residue of the joint lives of them the said [*eldest son*] and [*youngest son*], and into an equal participation of the gains and profits of the same trade and business: *And also* shall and will,

Deed of copartnership to contain usual clauses.

at such request of him the said [*second son*], but at the equal costs and charges of them the said [*eldest son*] and the said [*second son*], enter into a proper deed or deeds of co-partnership with him the said [*second son*], in which said deed or deeds shall be contained all clauses, articles, and agreements which shall be necessary or requisite for explaining or confirming the terms aforesaid respecting the said intended copartnership, and which shall be usual in deeds or articles of co-partnership of the like nature. PROVIDED ALWAYS, That in case the said [*second son*] shall live to attain his age of twenty-one years, and shall be desirous of declining to enter into co-partnership with him the said [*eldest son*], upon the terms hereinbefore expressed, and shall in consequence thereof give unto the said [*eldest son*], or leave at his usual place of residence, notice in writing of such the desire of him the said [*second son*], by the space of three calendar months next after the said [*second son*] shall so attain his said age of twenty-one years; or in case the said [*second son*] shall live three calendar months after he shall attain his said age of twenty-one years, and shall, during that time, refuse or neglect to give unto the said [*eldest son*], or to leave at his usual place of residence, notice in writing signifying the desire of him the said [*second son*], to carry on the same trade or business in co-partnership with him the said [*eldest son*], upon the terms aforesaid, or in

In case the second son declines, or dies, the eldest son to have the whole.

[*199] *case the said [*second son*] shall not live to attain his said age of twenty-one years—*Then*, and in any or either of

SETTLEMENT OF LANDS AND STOCK IN TRADE BY A PERSON CHARGED WITH FELONY.

the said cases, *it is hereby agreed and declared*, between and by the said parties hereto, That he the said [*eldest son*], his heirs, executors, administrators, and assigns, shall, from and immediately after the said [*second son*] shall so attain his age of twenty-one years, or shall die under that age, have, hold, occupy, possess, enjoy, and be entitled to the said messuages or tenements, workshops, offices, outhouses, and hereditaments, stock, goods, and effects, wares, merchandizes, implements, and utensils, together with the said trade or business, and the gains and profits thereof, and other the trust premises, TO AND FOR HIS AND THEIR OWN USE AND BENEFIT ABSOLUTELY—*Subject, nevertheless*, to the payment of the said yearly sum of 150*l.* to or for the benefit of the said [*third son*], the third and youngest son of the said [*grantor*], as aforesaid; *And also* subject, in the event of his the said [*second son's*] so attaining his age of twenty-one years, and refusing or neglecting to signify such his desire as aforesaid, within the time aforesaid, to the payment unto him the said [*second son*], his executors or administrators, of the sum of 2000*l.*, under or in pursuance of the proviso or agreement for that purpose next hereinafter contained. PROVIDED ALWAYS, That in case the said [*second son*] shall so attain his said age of twenty-one years, and shall, within three calendar months then next ensuing, give unto the said [*eldest son*], his executors or administrators, or leave at his or their usual place of residence, notice in writing of his wish to decline entering into co-partnership with him the said [*eldest son*], in the aforesaid trade or business, under the terms aforesaid, or in case the said [*second son*] shall live three calendar months after he shall so attain his age of twenty-one years, and shall during that time neglect or refuse to give unto the said [*eldest son*], or leave at his usual place of residence, notice in writing of the desire of him the said [*second son*] to enter into co-partnership with him the said [*eldest son*], in the aforesaid trade or business, upon or under the terms aforesaid—*Then*, and in either of the said cases, it is hereby agreed and declared between and by the said parties hereto, that he the said *[*eldest son*], his heirs, executors, or administrators, shall, within the space of six months next after the said [*second*

If the second son declines, to receive 2000*l.*

[*200]

SETTLEMENT OF LANDS AND STOCK IN TRADE BY A PERSON CHARGED WITH FELONY.

son] shall attain his said age of twenty-one years, by mortgage, sale, or other disposition of the said messuages or tenements, workshops, offices, outhouses, and hereditaments, stock, goods, and effects, wares, merchandizes, implements, utensils, and trust premises, or of a competent part or parts thereof, or by, with, and out of the gains and profits of the said trade or business, or by all and every or any of the aforesaid ways or means, (*but subject, nevertheless,* and without prejudice, to the payment of the aforesaid yearly sum of 150*l.* to or for the benefit of the said [*third son*]), levy and raise the sum of 2000*l.* of lawful money of Great Britain, and shall and do pay the said sum of 2000*l.* unto him the said [*second son*], his executors, administrators, or assigns, for his and their own use and benefit, or as he or they shall direct or appoint, in lieu or satisfaction of the moiety, part, or share to which he the said [*second son*], his heirs, executors, and administrators would have become entitled in, to, or out of the said messuages or tenements, workshops, offices, outhouses, and hereditaments, stock, goods, and effects, wares, merchandizes, implements, utensils, and trust premises, in the event of his having become, or consented to become, a co-partner with the said [*eldest son*] in the said trade or business as aforesaid (*a*). PROVIDED ALWAYS, *and it is hereby also agreed and declared,* between and by the said parties hereto, that the interest, dividends, and annual produce of the stocks, funds, and securities, in or upon which the said yearly sum of 150*l.* so directed to be raised to or for the said [*third son*], shall be laid out or invested pursuant to the trusts aforesaid, shall, from time to time during his minority, as and when the same shall arise or become due and payable, be laid out and invested in the name or names of the trustee or trustees for the time being of such stocks, funds, or securities—*To the intent* that the same interest, *dividends, and annual produce, may from time to time accumulate and go along with the original stocks, funds, or securities, from or in respect

But subject to annuity to third son.

The interest to arise from the fund, to be invested for the benefit of the youngest son, in order to accumulate.

[*201]

(*a*) No provision seems to be made for the event of the eldest son dying before the second son attains his majority.

of which such interest, dividends, or annual produce shall arise or become payable, any thing hereinbefore contained to the contrary notwithstanding. PROVIDED ALSO, *and it is hereby further agreed and declared*, that in case the said [*third son*] shall happen to die under his age of twenty-one years, then the yearly sum or respective sums of money so directed to be raised in trust for him or them so dying under the age of twenty-one years as aforesaid, up to and until the time of his decease, and the stocks, funds, and securities, in or upon which the same shall or may be invested as aforesaid, together with the accumulations thereof, shall go and belong to the said [*eldest son*], for his own use and benefit. (*Indemnity Clause, and Declaration that the receipts of* [*eldest son*], *his executors and administrators, shall be valid, ut ante*, Vol. II. p. 26). AND the said [*grantor*], for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the said [*eldest son*], his heirs, executors, administrators, and assigns, That he the said [*grantor*], his heirs, executors, and administrators, and all and every other person and persons lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or interest, in, to, or out of the said messuages or tenements, hereditaments, stock, goods, effects, wares, merchandizes, implements, utensils, and other the premises hereinbefore mentioned, and intended to be hereby respectively released, bargained, sold, and assigned, or any of them, or any part thereof, by, from, or under him or them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges in the law of the said [*eldest son*], his heirs, executors, administrators, or assigns, or any of them, make, do, acknowledge, levy, suffer, and execute, or cause or procure to be made, done, acknowledged, levied, suffered, and executed, all and every such further and other lawful and reasonable acts, deeds, and things, devices, conveyances, and assurances in the law whatsoever, for the further, [better, more *perfectly and absolutely granting, releasing, assigning, and] assuring the said messuages or tenements, hereditaments, stock, goods, effects, wares, merchandizes, implements, utensils, and other the

SETTLEMENT OF LANDS AND STOCK IN TRADE BY A PERSON CHARGED WITH FELONY.

In case of his death during minority, the fund to belong to his eldest brother.

Covenant by grantor for further assurance.

[*202]

SETTLEMENT OF LANDS AND STOCK IN TRADE BY A PERSON CHARGED WITH FELONY.

premises, with their and every of their appurtenances, unto and to the use of the said [*eldest son*], his heirs, executors, administrators, and assigns respectively, Upon and for the trusts, intents, and purposes aforesaid, or such of them as shall be then existing and capable of taking effect, as by the said [*eldest son*], his heirs, executors, administrators, or assigns, or any of them, or his, their, or any of their counsel in the law, shall be reasonably advised or devised, and required; so that the person or persons who shall be required to make and execute such farther assurance and assurances, be not compelled or compellable, for the making or doing thereof, to go or travel from his or their respective usual place or places of abode. [AND the said [*eldest son*] doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said [*grantor*], his executors and administrators —That he the said [*eldest son*], his heirs, executors, administrators, and assigns, shall and will, to the utmost of his and their power and ability, perform all and every the trusts hereby in him and them reposed, and fulfil and keep all and singular the agreements hereinbefore expressed and contained, and on his and their parts to be performed and kept, according to the true intent and meaning of these presents]. IN WITNESS, &c.

Covenant by eldest son to execute the trusts.

[203]

ASSIGNMENT OF PERSONAL ESTATE BY A PERSON CHARGED WITH FELONY.

ASSIGNMENT, *by a Person* COMMITTED *for a* FELONY, *of* LEASEHOLDS, DEBTS, *and other* PERSONAL ESTATE, *Upon Trust to pay* DEBTS, *raise* MONEY *for the* ASSIGNOR, *and the Residue for the* WIFE *as she shall* APPOINT; *in Default thereof for her* SEPARATE USE; *and after her Death for the* CHILDREN.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*assignor*] and [*wife*], his wife, of the one part; and [*eldest son*], (who is the eldest son and heir apparent of the said [*assignor*] by the said [*wife*], his wife), of the

Parties.

ASSIGNMENT OF PERSONAL ESTATE BY A PERSON CHARGED WITH FELONY.

Recital of lease.

other part: WHEREAS the said [*assignor*] is now possessed of, or entitled unto, a certain messuage or tenement, with the garden, stable, and appurtenances thereto belonging, heretofore called the White Hart, and lately in the possession of ——, and now of the said [*assignor*], situate, lying, and being in the parish of ——, in the county of ——, for and during the residue of a term of ninety-nine years, determinable upon the decease of [*cestui que vie*], and [*cestui que vie*], and the survivor of them, created by an indenture bearing date the —— day of ——, and made between [*lessor*], of the one part, and [*lessee*] of the other part; under the yearly rent, and subject to the covenants and agreements in the same indenture reserved and contained, on the tenant's or lessee's part to be paid and performed: AND WHEREAS, *(recitals of other leases)*:

That assignor is possessed of goods, &c.

AND WHEREAS the said [*assignor*] is also possessed of or entitled to divers goods, chattels, debts, credits, and other personal estate, to a considerable amount or value: AND WHEREAS the said [*assignor*] being desirous of making a provision as well for the payment of his debts, as for the said [*wife*] his wife, in manner and with the powers hereinafter mentioned, hath proposed and agreed to transfer, assign, and make over unto the said *[*eldest son*], his executors, administrators, and assigns, all and singular the aforesaid leasehold estates, and the said chattels, debts, effects, and personal estate whatsoever and wheresoever, and of what nature and kind soever, of him the said [*assignor*], (*save and except* such part and parts thereof as are hereinafter excepted), Upon and for the trusts, intents, and purposes, and subject to the powers, provisoes, declarations, and agreements hereinafter expressed concerning the same.

In order to make provision for payment of debts, &c., hath agreed to assign over.

[*204]

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited proposal and agreement on the part of the said [*assignor*], and for making a provision for the payment of the just debts of him the said [*assignor*], due and owing; and for and in consideration of the natural love and affection which he the said [*assignor*] hath and beareth for and towards the said [*wife*], his wife; *And* also for and in consideration of the sum of 5*s.*, of lawful money of Great Britain, to him the said [*assignor*] in hand well

ASSIGNMENT OF PERSONAL ESTATE BY A PERSON CHARGED WITH FELONY.

Assignment of the leaseholds.

and truly paid by the said [*eldest son*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said [*assignor*] *hath* granted, bargained, sold, assigned, transferred, and set over, And by these presents *doth* grant, bargain, sell, assign, transfer, and set over unto the said [*eldest son*], his executors, administrators, and assigns, ALL THAT the aforesaid (*describe the leasehold estates*), and all other the messuages, lands, and premises, (if any), comprised in or demised by the said several hereinbefore recited indentures of lease, or any of them; *And all* the estate, right, title, term and terms of years, property, profit, claim, and demand whatsoever of him the said [*assignor*], in, to, or out of the same leasehold premises, and every or any of them, and every or any part thereof; TO HAVE AND TO HOLD the said messuages, lands, tenements, hereditaments, and all and singular the premises hereby assigned, or intended so to be, with their and every of their appurtenances, unto the said [*eldest son*], his executors, administrators, and assigns, henceforth, for and during all such term, estate, and interest, terms, estates, and interests, as he the said [*assignor*] now hath therein respectively, [and in as full, large, ample, and beneficial manner, to all intents and purposes, as he the said [*assignor*] now holds, or is entitled to hold, or otherwise might or could have held and enjoyed the same respectively, in case these presents had not been made as aforesaid]; *Nevertheless*, upon and for the trusts, intents, and purposes, [and under and subject to the several powers, provisoes, declarations, and agreements] hereinafter expressed concerning the same. AND THIS INDENTURE FURTHER WITNESSETH, that, in further pursuance of the said recited agreement, and in consideration of the premises, and of 5*s.*, of lawful money of Great Britain, to the said [*assignor*] in hand paid by the said [*eldest son*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, *He* the said [*assignor*] *hath* granted, bargained, sold, assigned, transferred, and set over, and by these presents *doth* grant, bargain, sell, assign, transfer, and set over unto the said [*eldest son*], his executors, administrators, and assigns, *All and singular* the sum and sums of

Parcels.

Habendum unto eldest son, upon trusts hereinafter declared.

[*205]

Further *testatum*.

Assignment of monies due on security, &c.

money, of or belonging to him the said [*assignor*], in the public stocks or funds of Great Britain, and upon Government, turnpike, navigation, or other real or personal securities; and all and singular other the debt and debts, sum and sums of money, due and owing to him the said [*assignor*], from any person or persons whomsoever, either in the course of the trade or business by him heretofore carried on, or otherwise; *Together* with all notes, bills, bonds, and other securities for the same respectively; *And* all the interest, dividends, and annual produce already due and henceforth to grow due, for or in respect of the said stocks, funds, securities, debts, monies, and premises; *And also* all and singular the goods, chattels, effects, and other the personal estate whatsoever of him the said [*assignor*], or whereof or wherein the said [*assignor*], or any person or persons whomsoever, in trust for him, is or are possessed, or in anywise interested; *And all* the estate, right, title, property, claim, and demand whatsoever, at law and in equity, of him the said [*assignor*], in, to, or out of the same premises, and every of them, and every part thereof, (*save and except nevertheless* and always reserved out of this bargain and sale, transfer, and assignment, all and every the stock, goods, wares, merchandizes, implements, utensils, articles, and things belonging and appertain-*ing to the said trade or business of the said [*assignor*], except the several debts or sums of money to him the said [*assignor*] due and owing in the course of his said trade, and which are intended to be hereinbefore assigned as aforesaid, and which said stock, goods, wares, merchandizes, implements, utensils, articles, and things (except as aforesaid) are comprised in an indenture bearing even date herewith, and made between the said [*assignor*] and [*wife*], his wife, of the first part; the said [*eldest son*], of the second part; and [*third son*], of the third part; and thereby assigned, or intended to be assigned, to the said [*eldest son*], his executors, administrators, and assigns, upon and for the trusts, intents, and purposes therein mentioned): To HAVE, HOLD, receive, and take all and singular the said stocks, funds, securities, debts, and sums of money, goods, chattels, and personal estate, and other the premises hereinbefore mentioned, and intended to be hereby bargained, sold,

ASSIGNMENT OF PERSONAL ESTATE BY A PERSON CHARGED WITH FELONY.

And all other personal estate.

Exception of stock in trade, &c. assigned by preceding deed.

[*206]

Habendum of personal estate to eldest son.

ASSIGNMENT OF PERSONAL ESTATE BY A PERSON CHARGED WITH FELONY.

and assigned (except as aforesaid), unto and by the said [*eldest son*], his executors, administrators, and assigns, henceforth, as and for his and their own goods, chattels, and monies absolutely; *But, nevertheless*, upon and for the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same. (*Power of Attorney, see form, ante*, Vol. I. p. 348, *to receive, &c.* "all and every the debt and debts, sum and sums of money hereby assigned, and every part thereof respectively)." AND

Declaration of the trusts.

AS TO, FOR, AND CONCERNING (*a*) as well the said messuages, lands, tenements, hereditaments, and leasehold premises intended to be hereby assigned, as the said stocks, funds, and securities, and monies intended to be hereby assigned, and the said stocks, funds, securities, monies, debts, goods, chattels, and personal estate, intended to be hereby bargained, sold, and assigned as aforesaid, it is hereby agreed and declared between and by the said parties here-

[*207] *to, that he the said [*eldest son*], his executors, administrators, and assigns, shall henceforth stand possessed of and interested in the same respectively, and the rents and profits, interest, dividends, and annual produce thereof respectively; upon and for the trusts, intents, and purposes, and under and subject to the powers, provisoes, and declarations hereinafter expressed concerning the same, that is to say, UPON TRUST that he the said [*eldest son*], his executors, administrators or assigns, shall and do forthwith, as soon as conveniently may be, receive, recover, collect, and get in the several debts and sums of money intended to be hereby assigned as aforesaid, or such of them as shall not be due and owing, or secured upon or by virtue of Government, turnpike, navigation, or real securities; AND UPON FURTHER TRUST that he the said [*eldest son*], his executors, administrators or assigns, shall

First to collect debts;

Then to pay debts owing from assignor.

Shorter form of declaring trusts.

(*a*) A shorter form of framing this clause is,—

"*And it is hereby declared and agreed*, that the said [*eldest son*], his executors, administrators, and assigns, shall stand possessed of the leasehold premises and other personal estate hereby assigned, Upon the trusts following, namely."

and do, with and out of the monies so to be received, collected, and got in as aforesaid, or by, with, or out of the rents and profits, interest, dividends, or annual produce of the said leasehold premises, and the stocks, funds, securities, and personal estate, or a competent part or parts thereof, or by all and every or any of the aforesaid means, forthwith, within three calendar months from the day of the date hereof, in the first place raise and levy and appropriate such sum and sums of money, as shall be sufficient, after payment of the costs, charges, and expenses of him the said [*eldest son*], his executors, administrators and assigns, in and about the execution of the trusts hereby in him and them reposed (*a*), to answer, pay, and satisfy the several debts and sums of money by him the said [*assignor*] owing, mentioned and specified in the schedule thereof hereunder written, or hereunto annexed,

ASSIGNMENT OF PERSONAL ESTATE BY A PERSON CHARGED WITH FELONY.

[*208]

(*a*) *Or*, "to pay and satisfy such debt or debts, sum or sums of money, now due or owing by the said [*assignor*] to any person or persons, as shall be verified to the satisfaction of the said [*eldest son, or other trustee*], his executors, administrators or assigns, or such of them, or such part or parts thereof respectively, as he or they shall think proper to pay and satisfy; And do and shall, at his or their discretion, either pay all the surplus or residue of the said trust monies, stocks, funds, or securities, to the said [*assignor*], his executors, administrators, or assigns, for his or their proper use and benefit, or apply the same for the benefit or advantage of the said [*assignor*], in such manner as the said [*trustee*], his executors, administrators or assigns, shall think proper. *And it is hereby agreed and declared* between and by the said parties to these presents, that it shall be lawful for the said [*trustee*], his executors, administrators or assigns, to compromise or compound any of the said debt or debts, which are or shall be claimed to be due or owing from or to the said [*assignor*], for any sum or sums of money, and also to submit the same, or any dispute or question relating thereto, to arbitration or arbitrations, and umpirage, in such manner as he or they shall think proper."

Another form of trust to pay debts.

Power to compound debts and refer to arbitration.

ASSIGNMENT OF PERSONAL ESTATE BY A PERSON CHARGED WITH FELONY.

together with interest upon or in respect of such of the same debts as respectively carry or bear interest, and shall and do apply such sums of money so to be levied, raised, and appropriated in satisfaction of such debts accordingly; *And* shall and do in the next place, and within the time aforesaid, raise and levy the sum of ——, of lawful money of Great Britain, and shall and do pay the same unto the said [*assignor*], his executors, administrators and assigns, for his and their own use and benefit, or as he or they shall direct or appoint; AND UPON FURTHER TRUST that the said [*eldest son*], his executors, administrators and assigns, shall and do lay out and invest the surplus (if any) of the monies so to be collected, recovered, and got in, and to arise by such sale, mortgage, transfer, or disposition as aforesaid, after the several payments hereinbefore directed to be made as aforesaid, in his or their name or names, in the public stocks or funds of Great Britain, or in or upon Government, turnpike, navigation, or real securities; And shall and do from time to time alter, vary, and transpose the same stocks, funds, and securities, as he or they shall think proper, or see occasion. AND UPON FURTHER TRUST, that he the said [*eldest son*], his executors, administrators and assigns, shall and do stand possessed of or interested in the said leasehold premises, and the said stock, funds, securities, *personal estate, and other the trust premises, or so much thereof, and such part and parts thereof, as shall remain unsold and undisposed of; and of and in the equity of redemption of so much and such part and parts thereof as shall be mortgaged in performance of and pursuant to the trusts aforesaid; upon and for the trusts, intents, and purposes hereinafter expressed concerning the same; that is to say, IN TRUST for such person or persons, and for such intents and purposes, and in such manner and form, as the said [*wife*] (*a*), whether covert or sole, by any

Next to raise a sum of money for assignor.

And to invest the residue on Government or real security.

With power to vary funds;

Eldest son, his executors, &c., to stand possessed of trust premises.

[*209]

In trust for the appointees of the wife.

(*a*) The design in giving the wife an absolute power of appointment, it will be observed, was, that she might, if the husband were acquitted, (as happened in the present instance), revest the property in him, by means of her appointment.

deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of, and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of, or purporting to be, her last will and testament, or any codicil or codicils thereto, to be by her signed and published in the presence of, and attested by, three or more credible witnesses, shall from time to time direct or appoint: *And* in default of, and until such direction or appointment, [and as to such part or parts of the premises of which no direction or appointment shall be made, or to which the same shall not extend], UPON FURTHER TRUST, that he the said [*eldest son*], his executors, administrators, or assigns, shall and do, during the natural life of the said [*wife*], from time to time as the same shall become due and payable, pay and apply the yearly rents and profits, interest, dividends, and annual produce of all and singular the said trust premises, or of so much thereof as shall not be directed, limited, or appointed, as aforesaid, into the proper hands of her the said [*wife*], for her sole and separate use, independent of her said or any future husband, and not to be subject to his debts or control, [or to such person or persons as she, by any note or writing *under her hand, from time to time, notwithstanding her coverture, shall direct or appoint the same to be paid. *And* the receipt or receipts of the said [*wife*], or of the person or persons to whom she shall appoint the same to be paid, in manner aforesaid, shall be a good and sufficient release and discharge to the person or persons who shall pay the same rents, profits, interest, dividends, and proceeds, and to his, her, or their executors or administrators, for so much as in such receipt or receipts shall be expressed or acknowledged to be received] (*a*);—

ASSIGNMENT OF PERSONAL ESTATE BY A PERSON CHARGED WITH FELONY.

In default of appointment,

for the separate use of the wife for life.

[*210]

(*a*) The clause within brackets is quite unnecessary. The provision for the separate use of married women seems to have grown into extraordinary prolixity; which, in the first instance, probably arose from the doubts that at an early period attached to the validity of such a mode of limitation, and which induced a more than common anxiety explicitly to

As to the mode of framing trusts for *separate use*.

ASSIGNMENT OF PERSONAL ESTATE BY A PERSON CHARGED WITH FELONY.

After her decease, in trust for the children.

And from and after the decease of the said [*wife*], THEN UPON TRUST, that he the said [*eldest son*], his executors, administrators, and assigns, shall stand possessed of, and interested in, all and singular the trust premises, or so much thereof as shall not be directed, limited, or appointed, under the aforesaid power, IN TRUST for all and every the child and children of the said [*assignor*] on the body of the said [*wife*] begotten, or to be begotten, equally to *be divided between them, share and share alike. [The share of the said [*eldest son*], the eldest son of the said [*assignor*], who hath already attained his age of twenty-one years, to be an interest vested in him, (subject to any such appointment as aforesaid), immediately upon the execution of these presents, but the transfer thereof to be postponed till the decease of his mother the said [*wife*]; and the share or shares of the others of the said children, being a son or sons, to be an interest vested in him or them respectively, at his or their age or respective ages of twenty-one years; and being a daughter or daughters, to be an interest vested in her or them respectively, at her or their age or respective ages of twenty-one years, or day or respective days of marriage, which shall first happen; and to be paid and assigned to them respectively, at or on such respective days or times, if the same shall respectively happen after the decease of the said [*wife*]; but if the same shall happen in his or her lifetime, then immediately after her decease (*a*)]. And in case any one or more of

Declaration as to the period of vesting.

[*211]

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declare the intention of the parties. Very slight expressions, however, have been held sufficient to create a trust for the separate use of a married woman. See *Kirk* v. *Pawlin*, 7 Vin. Ab. 96, pl. 43; *Adamson* v. *Armitage*, Geo. Coop. 283; *S. C.* 19 Ves. 416; *Ex parte Ray*, 1 Madd. 199; *Prichard* v. *Ames*, 1 Turn. 222; *Lee* v. *Preiaux*, 3 B. C. C. 381; but see also *Lumb* v. *Milnes*, 5 Ves. 517; *Wills* v. *Sayers*, Geo. Coop. 283; *Roberts* v. *Spicer*, 5 Madd. 491. No cautious practitioner, however, will approach too near the debateable line. The following form seems to be sufficiently explicit, without unnecessary verbosity:

"UPON TRUST to pay the rents and profits of the said hereditaments unto [*feme covert*] during the term of her natural life, for her separate use, free from the control or debts of her present husband, or any future husband or husbands with whom she may from time to time intermarry."

Remarks on the

(*a*) This clause within brackets, though frequently used, is superfluous,

ASSIGNMENT OF PERSONAL ESTATE BY A PERSON CHARGED WITH FELONY.

such children, being a son or sons, shall die under the age of twenty-one years, or being a daughter or daughters shall die under that age, and without having been married, then, as well as to the original share or shares of such child or children, as the share or shares accruing to him, her, or them respectively, under this cross limitation, IN TRUST for all and every other the child and children of the said [*assignor*] on the body of the said [*wife*] begotten, or to be begotten, including the said [*eldest son*], equally to be divided between them, if more than one, share and share alike; [such accruing share or respective shares to be vested, payable, and transferable, at the like age or ages, period or periods, and in like manner, in all respects, as the original share or respective shares of such child or children.] And in case all the said children, except the said [*eldest son*], being [a son or] (*a*) sons, shall

Clause of survivorship and accruer.

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and is not quite correct; for, under the prior words, it is clear that the shares would vest in the existing children immediately, and in the unborn children at their respective births. To this limitation, therefore, the present clause is contradictory: it is also inconsistent with the provision of accruer, which follows; for, if the shares are not to vest until the majority of sons, or the majority or marriage of daughters, it is incorrect and inconsistent to limit over the shares of children dying before this period, who never become objects, and have therefore no shares to be disposed of. If it be intended that the vesting shall be postponed until the majority of sons, or the majority or marriage of daughters, this should be made part of the qualification in the original description of the objects. The clause would then run thus:—

declaration as to the vesting in the text.

"IN TRUST for the said [*eldest son*], and every other child of the said [*assignor*] begotten, or to be begotten, on the body of the said [*wife*], who, being a son, shall attain the age of twenty-one years, or being a daughter shall attain that age or marry; if more than one, equally to be divided between them, share and share alike."

Concise trust for children.

This is a concise mode of limitation, because it requires no cross gifts; but where it is adopted, especial care should be taken, that provisions for maintenance out of the presumptive shares during the minority of sons, and the minority and discoverture of daughters, are inserted, as, during such minority or discoverture, they are not objects of the trust.

(*a*) As in this case there are more sons than one living at the time of the

ASSIGNMENT OF PERSONAL ESTATE BY A PERSON CHARGED WITH FELONY.

die under the [age or] respective ages of twenty-one years, or being a daughter or daughters under that age, or unmarried, then IN TRUST for the said [*eldest son*], for his own absolute use and benefit: And upon or for no other trust, intent, or purpose whatsoever. PROVIDED ALWAYS, *and it is hereby declared*, that, from and after the decease of the said [*wife*], it shall be lawful for the said [*eldest son*], his executors or administrators, to pay and apply the rents and profits, dividends, interest, and annual produce of the expectant or presumptive share of every such child of the said [*assignor*] on the body of the said [*wife*] his wife begotten, or to be *begotten, who being a son shall then be under the age of twenty-one years, or being a daughter shall be under that age and unmarried, of and in the said trust premises, or of and in so much thereof as shall not be limited or appointed by the said [*wife*] under the power aforesaid, for or towards his or her maintenance, support, and education, in such manner as he the said [*eldest son*], his executors or administrators shall think proper, until such respective child, being a son, shall attain his age of twenty-one years, or being a daughter shall attain that age or marry. PROVIDED ALSO, *and it is hereby declared*, that the receipt or receipts of the said [*eldest son*], his executors or administrators, shall be a sufficient release and discharge to any [purchaser or mortgagee, purchasers or mortgagees of all or any of the premises, or any part or parts thereof, or any other] person or persons having trust monies in his or their hands, on securities or otherwise, for so much monies as in such receipt or receipts shall be expressed or acknowledged to be received. And that [the said purchaser or mortgagee, purchasers or mortgagees, or] such [other] person or persons as aforesaid paying the same monies, and taking such receipt or receipts, shall not be bound to see to the application thereof, or of any part thereof. IN WITNESS, &c.

Provision for maintenance during minority and discoverture.

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Trustee's receipts to be discharges.

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execution of the deed, (see last precedent, p. 192), the words applicable to a single son, though generally required, are not wanted.

RECONVEYANCE *and* RE-ASSIGNMENT *of the Premises comprised in Precedent* (sup. p. 192,) *and* APPOINTMENT *of the Annuity to* [the original grantor] *absolutely* (*a*).

RECONVEYANCE, &c. TO A PERSON CHARGED WITH FELONY ON ACQUITTAL.

THIS INDENTURE, made the —— day of ——, BETWEEN the within-named [*eldest son*], of the first part; the within-named [*second son*], of the second part; the within-named [*father*] and [*mother*], his wife, of the third part; and [*releasee to uses and trustee to prevent dower*], of the fourth part. WHEREAS the said [*father*], being desirous, since the date and execution of the within-written indenture, of returning to and resuming and carrying on the said trade or business of a timber-merchant, so carried on by him as within mentioned, and they the said [*eldest son*], [*second son*], and [*mother*], the wife of the said [*father*], conceiving that it will be conducive and more beneficial to the general interests of the said [*father*], and the whole of his family, that the same trade or business should be conducted and carried on by the said [*father*], as heretofore; it hath been agreed between them, that the within-written indenture, and all the trusts, powers, provisoes, and agreements therein contained, should be annulled and determined—*And* for that purpose the said [*eldest son*], at the request, and by the direction, as well of the said [*second son*], as of the said [*father*] and [*mother*], his wife, hath consented and agreed to re-convey and re-assign the messuages or tenements, offices, outhouses, and other freehold hereditaments within mentioned to be conveyed and assured, and also the stock,

Parties.

Recitals. That the father was desirous of returning to his business, and the eldest son had agreed to reconvey to him.

(*a*) The assignor in the two preceding deeds having been acquitted of the felony, the following deeds of reconveyance and re-assignment and appointment were executed, in order to revest the property in him, being respectively indorsed on the original deeds.

RECONVEYANCE, &c. TO A PERSON CHARGED WITH FELONY ON ACQUITTAL.

goods, and effects in trade, wares, merchandizes, implements, and utensils, and other the personal estate within mentioned to be assigned to the said [*eldest son*], as within expressed, unto and to uses, or for the benefit of the said [*father*], his heirs, executors, administrators, and assigns respectively, in manner hereinafter mentioned; absolutely discharged of and from the within-mentioned trusts, provisoes, declarations, and agreements respectively declared thereof; he the said [*father*] having, to the satisfaction of the said [*eldest son*], agreed or undertaken to indemnify the said [*eldest son*], his heirs, executors, and administrators, of and from all loss, costs, charges, damages, and expenses which he or they may suffer, sustain, or be put unto, for or by reason of such reconveyance and re-assignment. NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, and in pursuance of the said recited agreement, and for and in consideration of the sum of 5*s.* of lawful money of Great Britain, to the said [*eldest son*] in hand paid by the said [*father*], at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged—*He* the said [*eldest son*], at the request, and by the direction of the said [*second son*], and [*father*], and [*mother*], his wife, (testified, &c.), *hath* bargained, sold, aliened, and released, and by these presents *doth* bargain, sell, alien, and release, and the said [*second son*] *doth* hereby remise, release, and for ever quit claim unto the said [*releasee to uses*] (in his actual, &c., *ut ante*, Vol. I. p. 655), and to his heirs, ALL THOSE the several messuages, dwelling-houses, tenements, offices, outhouses, and all and singular other the freehold hereditaments mentioned and comprised in the within-written indenture of release, and thereby granted and released unto and to the use of the said [*eldest son*], his heirs and assigns, or intended so to be, and every of them, and every part and parcel thereof; *And* all houses, &c. *And* the reversion, &c. *And* all the estate, &c. TO HAVE AND TO HOLD the said messuages or dwelling-houses, and all and singular other the premises hereby released, or intended so to be, [*216] *with their and every of their rights, members, and appurtenances, unto the said [*releasee*] and his heirs for ever;

The father having undertaken to indemnify the son.

Testatum.

Reconveyance of freeholds by the eldest son, and release by the second son.

Parcels.

Habendum to the father in fee to uses.

Freed and absolutely discharged of and from all and singular the trusts, powers, provisoes, declarations, and agreements in the within-written indenture expressed, declared, and contained: *Nevertheless*, To THE USE of such person, &c. (*Uses in favour of the father to prevent dower*, ut ante, Vol. III. p. 554). AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said recited agreement, and in consideration of the further sum of 5*s.* &c., he the said [*eldest son*], at such request, and by such direction of the said [*second son*], and [*father*], and [*wife*], his wife, (testified as aforesaid), *hath* bargained, sold, assigned, transferred, and set over, and by these presents *doth*, &c.; And the said [*second son*] *doth* remise, release, and for ever quit claim, unto the said [*father*], his executors, administrators, and assigns, All and singular the stock, goods, and effects, wares, merchandizes, implements, utensils, articles, and things, in and by the within-written indenture bargained, sold, and assigned, or intended so to be, unto the said [*eldest son*], his executors, administrators, and assigns, as within expressed: *And* all benefit and advantage to be had or derived from, or acquired by, the said within-mentioned trade or business, or any branch thereof; And all the estate, &c. To HAVE, HOLD, RECEIVE, PERCEIVE, AND TAKE the said stock, goods, and effects, wares, merchandizes, implements, utensils, articles, and all and singular other the personal estate and premises hereby bargained, sold, and assigned, or intended so to be, as aforesaid, unto and by the said [*father*], his executors, administrators, and assigns, as and for his and their own proper goods and chattels, henceforth for ever; *absolutely discharged* of and from all and singular the trusts, powers, provisoes, declarations, and agreements in the within-written indenture expressed and contained concerning the same. AND the said [*eldest son*], for himself, his heirs, executors, and administrators, doth hereby covenant and declare with and to the said [*father*], his heirs, executors, administrators, and assigns, that he the said [*eldest son*] hath not at any time heretofore made, done, committed, or willingly or knowingly suffered, any *act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof, the said

RECONVEYANCE, &c. TO A PERSON CHARGED WITH FELONY ON ACQUITTAL.

Further *testatum*.

Assignment of personal estate.

Habendum to the father absolutely.

Covenant by eldest son that he hath not incumbered.

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RECONVEYANCE, &c. TO A PERSON CHARGED WITH FELONY ON ACQUITTAL.

messuages or dwelling-houses, and freehold hereditaments, and the said stock, goods, and effects in trade, wares, merchandizes, implements, utensils, articles, and personal estate hereby respectively released and assigned, or intended so to be, are, is, can, shall, or may be assured, incumbered, or prejudicially affected in title, estate, or otherwise howsoever. AND THIS INDENTURE FURTHER WITNESSETH, that, for the more effectually discharging the said real and personal estates hereby respectively released and assigned, or intended so to be, of and from the payment of the annuity or yearly sum of 300*l.* in and by the within-written indenture directed to be raised for the benefit and separate use of the said [*mother*], the wife of the said [*father*], as within mentioned, she the said [*mother*], the wife of the said [*father*], in pursuance of the power and authority for that purpose given or reserved to her in and by the within-written indenture, *doth*, by this deed or writing under her hand and seal, *direct* and *appoint* that the said annuity or yearly sum of 300*l.*, so directed to be raised as aforesaid, shall henceforth, during the continuance thereof, remain and be for the only use and benefit of the said [*father*], his heirs, executors, administrators, and assigns. IN WITNESS, &c.

Appointment of rent charge by the wife to the use of her husband.

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APPOINTMENT, &c. TO REVEST PROPERTY IN A PERSON CHARGED WITH FELONY ON ACQUITTAL.

APPOINTMENT *by the Wife*, (i. e. *the Mother*), *and* ASSIGNMENT *by the Eldest Son, of the Premises comprised in the Second Indenture*, supra, p. 203, *(being indorred thereon), to the Father absolutely.*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN the within-named [*eldest son*], of the first part; the within-named [*mother*], of the second part; and the within-named [*father*], of the third part: WHEREAS the several debts and sums of money due and owing by the said [*father*], and for the payment of which provision was made by the within-written indenture, have been duly

Recitals.

The wife is desirous that the trust premises

paid and satisfied by the said [*father*]; and as well in consideration of the payment so made by the said [*father*], as in consideration of the natural love and affection which the said [*mother*] hath for her husband the said [*father*], she the said [*mother*] is desirous that the within-mentioned leasehold estates, and the within-mentioned chattels, debts, effects, and personal estate, should be re-assigned unto the said [*father*], his executors, administrators, and assigns, freed and discharged of and from the trusts declared thereof in and by the within-written indenture. NOW THIS INDENTURE WITNESSETH, that, for effectuating the purpose aforesaid, and for the considerations hereinbefore expressed, and for divers other good causes and considerations her the said [*mother*] hereunto moving, she the said [*mother*], in pursuance of the power and authority for that purpose to her given and reserved in and by the within-written indenture, and in exercise and execution thereof, and of every other power and authority in her vested, or in anywise enabling her in this behalf, [*hath* directed, limited, and appointed, and] by this present deed or instrument in writing, by her sealed and delivered in the presence of, and attested by, two credible witnesses, *doth* *direct, limit, and appoint, that all and singular the leasehold messuages, lands, rents, hereditaments, and premises, in the within-written indenture mentioned, and thereby assigned, or intended so to be: *And also* all and singular the goods, chattels, debts, effects, and personal estate, mentioned in, and bargained, sold, and assigned, or intended to be bargained, sold, and assigned by the within-written indenture, and every of them, shall henceforth remain, continue, and be; and that the said [*eldest son*], his executors, administrators, and assigns, shall henceforth stand and be possessed of, and interested in, the same respectively, IN TRUST for the said [*father*], his executors, administrators, and assigns, and to be transferred and assigned from time to time as he or they shall direct or appoint; *freed and discharged* of and from the trusts declared thereof in and by the within-written indenture. AND THIS INDENTURE FURTHER WITNESSETH, that, for the more completely effectuating the purposes aforesaid, and for the considerations hereinbefore ex-

APPOINTMENT, &c. TO REVEST PROPERTY IN A PERSON CHARGED WITH FELONY ON ACQUITTAL.

should be re-assigned.

Testatum.

Appointment by the wife.

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Premises.

In trust for her husband absolutely.

Further *testatum.*

APPOINTMENT, &c. TO REVEST PROPERTY IN A PERSON CHARGED WITH FELONY ON ACQUITTAL.

Re-assignment, by the eldest son to the father,

pressed, and in pursuance of the said direction and appointment so made by the said [*mother*] as aforesaid; *And* in consideration of the sum of 5*s.* of lawful money of Great Britain to the said [*eldest son*] in hand paid by the said [*father*] at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said [*eldest son*], as well by virtue and in consequence of the direction and appointment so made by the said [*mother*] as aforesaid, as at the request of the said [*father*], (testified by his executing these presents), *hath* bargained, sold, assigned, transferred, and set over, and by these presents *doth* &c. unto the said [*father*], his executors, administrators, and assigns, *All and singular* the leasehold messuages, hereditaments, and premises mentioned in the within-written indenture, and thereby assigned or intended so to be, with their and every of their appurtenances; *And* all the estate, &c. To HAVE AND TO HOLD the said messuages, hereditaments, and premises intended to be hereby assigned, with their and every of their appurtenances, unto the said [*father*], his executors, administrators, and assigns, for and during all such term, estate, and interest, terms, estates, and interests, as he the said [*eldest son*] *now hath therein. AND THIS INDENTURE FURTHER WITNESSETH, that, *(consideration, &c. as before)*, he the said [*eldest son*], as well in consequence of the appointment so made by the said [*mother*] as aforesaid, as at the request of the said [*father*], testified as aforesaid, *hath* bargained, sold, assigned, transferred, and set over, and by these presents *doth* &c. unto the said [*father*], his executors, administrators, and assigns, ALL and every the sum and sums of money, debts, stock, funds, and securities, goods, chattels, effects, and personal estate whatsoever, in and by the within-written indenture bargained, sold, and assigned, or intended to be bargained, sold, and assigned unto the said [*eldest son*], his executors, administrators, and assigns, as within expressed, (except as within mentioned), And all the right, &c. To HAVE, HOLD, receive, and take all and singular the said debts and sums of money, stocks, funds, securities, goods, chattels, and personal estate hereby assigned, or intended so to be, unto the said [*father*], his executors, administra-

of the leaseholds.

Habendum to the father.

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Further *testatum.*

Assignment of the other personal estate.

Habendum to the father.

tors, and assigns, as and for his and their own goods, chattels, and monies, absolutely. *And* the said [*eldest son*] doth hereby for himself, his heirs, executors, and administrators, covenant and declare with and to the said [*father*], his executors, administrators, and assigns, That he the said [*eldest son*] hath not at any time heretofore made, done, executed, committed, or willingly or knowingly suffered, any act, matter, or thing whatsoever, whereby, or by reason or means whereof, the said leasehold hereditaments, chattels, debts, personal estate, and other the premises hereby bargained, sold, and assigned, or intended so to be, or any of them, or any part thereof, are, is, can, shall, or may be assigned, surrendered, released, impeached, charged, or made void or voidable, or in anywise incumbered. IN WITNESS, &c.

APPOINTMENT, &c. TO REVEST PROPERTY IN A PERSON CHARGED WITH FELONY ON ACQUITTAL.

Covenant by eldest son that he has not incumbered.

GIFT, DEED OF.

See titles "FORFEITURE," and "SETTLEMENT."

GRANTS AT COMMON LAW.

GRANTS.

Grant, what.

A GRANT, properly so called, (for the term is frequently used by the early writers in reference to *any* instrument by which property is conveyed), was the assurance at common law for the transfer of incorporeal hereditaments, by means of which, without livery of seisin, or any other ceremony except attornment, (which is now unnecessary), they became vested in the grantee; the only requisite to this species of conveyance being, that it should be *by deed*. *Crisp's case*, Cro. El. 163; see also *Sorrell* v. *Grove*, 1 Roll's Rep. 174; *Long* and *Hemming's case*, 1 Leon. 207, Co. Litt. 9. a. And though grants have been considerably superseded, in certain cases, by the modern assurance of lease and release, yet they retain their original efficacy, and are often very conveniently resorted to at the present day.

Incorporeal hereditaments, what.

Under the denomination of incorporeal hereditaments are included those rights or interests in land, which exist in contemplation of law, but cannot be the subject of manual or corporeal delivery; as common of pasture, of turbary, of fishing, and of estovers; advowsons, tithes, seigniories, ways, franchises, &c., rents, reversions, and remainders. 2 Roll. Ab. 47, 48; Shepp. Touchst. 238. But advowsons, tithes, franchises, rights of common, &c., which are appendant or appurtenant to a manor, rectory, or lands, will pass under a conveyance of such manor, rectory, or lands, whether by deed or not; and, on the other hand, where the deed is inoperative upon the principal subject, for want of livery, it will not pass the appendant incorporeal hereditaments, to which livery is not necessary, *Holden* v. *Smallbrooke*, Vaugh. 197, the rule being *accessorium sequitur suum principale*. See Co. Lit. 152. a.

It is scarcely necessary to observe, that incorporeal hereditaments, though not appendant or appurtenant (*a*), may be conveyed by bargain

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As to right of common.

(*a*) As to common, appendant, appurtenant, and in gross, see *Drury* v. *Kent*, Cro. Jac. 113; Perk. s. 104; 2 Sand. Us. 26; *Emerton* v. *Selby*, 1 Salk. 169; *Bennett* v. *Reeve*, Willes, 227; *Musgrave* v. *Franklyn*, Willes, 319; *Clements* v. *Lambert*, 1 Taunt. 205; and the early cases referred to in Com. Dig. and Vin. Ab., under the title "Common."

and sale enrolled, appointment, or any other conveyance deriving its effect from the statute of uses, as well as by grant at common law.

GRANTS AT COMMON LAW.

Attornment not necessary.

Before the statute of Anne, (14 Ann. c. 16, s. 9, stated *ante*, Vol. II. p. 668), grants of seigniories, rents, reversions, and remainders, required the attornment or assent of the tenant, in order to their validity, for certain purposes at least; (See Shepp. Touchst. 254); and Mr. Fearne, in a well-known argument which is in print, (see Fea. Posth. Works, 32), has laboured to shew that this statute could not be intended so far to repeal the statute of enrolments, 27 Hen. 8, c. 16, as to apply to grants of reversions or remainders for a *money* consideration; and consequently, that such grants still require enrolment; but the notion has been controverted by several writers, 2 Sand. Us. 41, Sugd. Gilb. Us. 226, and may be considered as exploded; though in practice it has become usual to convey remainders and reversions by lease and release, or bargain and sale enrolled, in order to avoid the necessity of proving the existence of the particular estate, on which the validity of the conveyance *as a grant* would depend. (*Vide ante*, Vol. II. p. 26.)

Void feoffments, &c., supported as grants.

In many instances, an instrument has been conveniently supported as a grant, (the subject being such as a grant could operate upon), where, for want of some ceremony which was otherwise essential to its validity, it could have no operation as that species of assurance which the parties intended. Thus, at an early period, it was held that a feoffment of lands in lease, which was void for want of livery of seisin, would, with the attornment of the tenant, (which was *then* requisite), operate as a grant. 2 Roll. Ab. 56, pl. 1; see also *Knotsford* v. *Edes*, Ib. pl. 2; *Lucy* v. *Englefield*, Ib. pl. 3. And the same has been decided as to a bargain and sale, which was not enrolled; *Adams* v. *Steer*, Cro. Jac. 210; and as to an appointment, which was not duly executed according to the terms of the power. *Shove* v. *Pincke*, 5 D. & E. 126. See also, in regard to the general doctrine, numerous cases cited *ante*, Vol. I. p. 452.

Bargain and sale enrolled held to operate as a grant.

And the rule has lately been carried a step farther; for an instrument intended by the parties to take effect as a bargain and sale, *and duly enrolled as such*, was held to operate as a grant, because the evident design of the parties in making the assurance would have been defeated if it had been construed as a bargain and sale. Thus, where A., being tenant in tail in possession of lands subject to a term of three hundred years, which was vested in trustees upon certain trusts, by indenture granted, bargained, and sold the lands to B. and C. and their heirs, to hold unto them, their heirs and assigns, to the use of D., his heirs and assigns, for ever, to the intent that he might become tenant of the freehold, in order that a common recovery might be suffered by A.; which recovery should enure to the use of A. in fee. The recovery was suffered, and the deed, after the return of the writ of seisin, was enrolled. Now, it is evident, that if this deed operated as a bargain and sale, the recovery was void for want

GRANTS AT COMMON LAW.

of a good tenant to the *præcipe;* for, as a bargain and sale does not operate by transmutation of possession, but transfers the *use* immediately to the bargainee, the use was executed in B. and C. and not in D. the tenant; and it was therefore contended, that the deed took effect as a grant, which created a seisin in B. and C., out of which the use to D. arose; and of this opinion seemed to be the Court, who held that the recovery was valid. *Haggerston* v. *Hanbury*, 5 Barn. & Cress. 101; *S. C.* 7 Dowl. & Ryl. 723. But, according to some early authorities, no instrument can operate upon reversions, &c. as a grant, unless it contain the word "grant;" Moo. 34, pl. 113; *Denton* and *Fettiplace's case*, cit. 1 Cro. Jac. 210; and these cases have been thought, by a deservedly esteemed writer, to warrant the conclusion, "that the word 'grant,' is essentially requisite in those cases, where the conveyance, by which the incorporeal property is intended to pass, is exclusively applicable to the transfer of corporeal hereditaments, or, being applicable to the transfer of both corporeal and incorporeal property, some ceremony necessary to the completion of it is omitted." 2 Sand. Us. 40.

Whether the word "grant," is essential in *any* case.

Observations upon Mr. *Sanders's* doctrine.

It is submitted, however, that this doctrine is not only inconsistent with the principles that have long obtained in the construction of deeds, and which teach us to regard the particular language and form of them as subservient to the intention, *ut res magis valeat quam pereat*, but is also contrary to several express authorities. Thus, in *Adams* v. *Steer*, Cro. Jac. 210, before cited, the words "alien, bargain and sell," in an instrument, (*probably* intended as a bargain and sale, but not enrolled), were held to pass the reversion. And it is observable, that, to treat the enrolment as a "ceremony necessary to the completion of" the deed in such a case, rather assumes the question; for if parties by deed simply "*bargain and sell*" a reversion in lands, unless it be established that these words are exclusively appropriated to an instrument requiring enrolment, how is the intention that it shall operate as such to be collected? But the authorities are not confined to such cases; for in *Shove* v. *Pincke*, 5 D. & E. 126, though the intention of the party to execute the power was apparent upon the face of the instrument, and though the word "grant" did not occur in it, (the only operative words being "limit and appoint,") yet the Court entertained no doubt that the deed would operate as a grant of the reversion. The case, however, was partly decided upon another ground. In *Goodtitle* v. *Bailey*, Cowp. 600, it was contended at the bar, that the words "renounce, remise, release, and quit claim," in an instrument intended as a release, could not operate as a grant; but the case was not decided upon the point. Enough, however, fell from Lord *Mansfield*, and Mr. J. *Aston*, to shew that they considered the argument untenable; and we apprehend it would meet with no better reception from the Courts at the present day.

Suggestion of

The doctrine, that deeds, which would otherwise be inoperative, may

take effect as grants, is often found very convenient in practice; for, from the frequency of keeping on foot satisfied terms of years, to attend the inheritance, as a protection against incumbrances, a large proportion of titles are subject to such terms; and it follows, that, in all such cases where the bargain and sale, feoffment, release or appointment, by which the inheritance is intended to be conveyed, is void as such, for want of enrolment, livery of seisin, lease for a year, or due attestation, &c. the instrument (if it contain the word *grant*, according to Mr. Sanders, and, according to the view before taken, whether it contain that word or not), may operate as a grant of the inheritance, subject to the term of years; though parties cannot be advised ordinarily to adopt this mode of conveying the inheritance in such cases, not only on account of the possibility that the term may have been accidentally merged, or (which is more probable) that the Courts might, from *non user*, presume a surrender of it, but because the term must be referred to for this purpose, which is objectionable, as it prevents the title to the inheritance and the term from being kept distinct. It may be suggested, however, whether the probability of supporting an instrument, intended to be an appointment, as a grant, does not diminish the necessity in the cases under consideration of making a vendor, who has both a power and an interest, release as well as appoint, (as is usually done), in order to provide for the possible event of the appointment being inoperative.

GRANTS AT COMMON LAW. cases in which instruments otherwise inoperative may conveniently be supported as grants.

In connection with the general subject of reversions and remainders, it may be useful to advert to the question, as to how far contingent remainders, and executory interests in general, in land, can be the subject of grant, or any other species of alienation. It has been long maintained, that, though assignable in equity, and releaseable both at law and in equity, they cannot, by deed at least, be *transferred* at law.

In order to bind these interests, therefore, recourse is usually had to a fine *sur concessit*, by means of which the lands are demised to the conusee for a long term of years. This plan is founded on the case of *Weale* v. *Lower*, Poll. 54; where it was considered, that though a fine *come ceo*, &c. had the effect of destroying a contingent remainder, yet, that where a contingent remainder-man grants a lease, and levies a fine *sur concessit* for five hundred years, notwithstanding that the fine operates at first by estoppel only, nevertheless, when the contingency happens, the estate "feeds the estoppel, *and then the estate by estoppel becometh an estate in interest, and shall be of the same effect as if the contingency had happened before the fine was levied.*" There seems, however, to be no necessity for a fine in such a case, for, according to several decisions, a demise *by indenture* simply has the same operation. Thus, in *Rawlyns's case*, 4 Rep. 51, (which is the leading authority), where Peter Cartwright, being possessed of a lease for thirty years in certain lands, except a stable whereof one Varlow was possessed for two years, assigned all his interest to Rawlyns,

How far contingent remainders are alienable.

May be bound by a fine *sur concessit*.

Effect of a demise upon a contingent interest.

GRANTS AT COMMON LAW.

and then (having no interest in the premises), by deed indented, demised the stable to Warlow for six years after the two years ended; and afterwards Rawlyns, by deed indented, re-demised to Cartwright: it was resolved by *Wray*, C. J., *Gawdy*, J., and the whole Court, "That the said lease made by Cartwright to Warlow by indenture, when he had nothing in the lease, was, notwithstanding, good against him by conclusion; and when Rawlyns re-demised the whole to him, *then was his interest bound with this conclusion;* and then when Cartwright re-demised the said stable to Rawlyns, now was Rawlyns concluded also; for all parties and privies in estate or interest are bound by estoppels; and then the case is no other, but Cartwright demises to Warlow for six years the said stable, and afterwards demises to Rawlyns for twenty years; so that this is a good lease in reversion for fourteen years." See also *Hermitage* v. *Tomkins*, 1 Lord Raym. 729.

The position established by *Rawlyns's case* is, that a demise by a person having *no* interest in the lands at the time, will take effect by conclusion out of an estate subsequently devolving upon him. See also Co. Litt. 45. a. And in a late case, Sir *J. Leach*, V. C., dismissed a bill for a conveyance by an annuitant, to whom certain lands had been conveyed by lease and release, by a person having no interest at the time, but upon whom the lands had subsequently devolved, on the ground that the former grant, being *by indenture*, took effect at law by estoppel. *Bensley* v. *Burdon*, 2 Sim. & Stu. 519. But it is important to observe, that the doctrine of *Rawlyns's case* only applies where the lessor had *no* interest in the land when he made the lease, for a lease which has once partially taken effect out of the interest, cannot afterwards operate by estoppel; and therefore, where a tenant for life made a lease for years, and afterwards purchased the fee, it was held that the lease determined by his death, and did not take effect out of the subsequently acquired fee. *Brown* v. *Weston*, Moo. 20, pl. 20; Co. Litt. 47. b.; *Brereton* v. *Evans*, Cro. El. 701; *Treport's case*, 6 Rep. 15; see also *Palmer* v. *Ekins*, 2 Ld. Raym. 1553; *Blake* v. *Foster*, 8 D. & E. 496. And it seems, too, that if it appear upon the face of the lease, that the lessor had no interest in the land, it will not operate by estoppel. *Hermitage* v. *Tomkins*, 1 Ld. Raym. 729.

Operation of an indenture by estoppel.

Since the period at which this doctrine was established, it has been settled also, that contingent and executory interests are devisable; *Jones* v. *Roe*, 3 D. & E. 88; and consequently, that, at the happening of the contingency, or if it happen in the testator's life-time, then at the death of the testator, *Jackson* v. *Hurlock*, 2 Ed. 263, the lands vest absolutely in the devisee. But though such interests are releaseable, and may be bound by a fine *sur concessit*, or by an indenture of demise by estoppel, and will even pass by a devise, yet it is still strenuously maintained by an eminent writer, 2 Prest. Abst. 118; Prest. Shepp. Touch. 238, and the opinion is commonly entertained by the profession, that they are not transferable by

Contingent and executory interests devisable.

Whether they can be transferred by deed.

GRANTS AT COMMON LAW.

deed. Recent decisions, however, leave us little room to doubt, that, even if such interests are not transferable by deed simply, they will pass by *indenture*, *i. e.* by any instrument capable of operating by estoppel. In *Doe* v. *Oliver*, 10 Barn. & Cress. 181, *vide supra*, p. 160, it was held that a fine *come ceo* &c., levied by a contingent remainder-man in fee, operated by estoppel only, until the contingency happened, and then operated to vest the estate absolutely in the *cestui que use* of the fine. The same point, we have seen, has been decided as to demises by indenture; and the only remaining question is, whether an indenture, *not having the operation of a demise*, would pass the estate in such a case. The affirmative conclusion seems to be inevitable upon the general reasoning of the cases, which has applied the doctrine of estoppel to indentures generally, and not to leases only, (see *Bensley* v. *Burdon*, 2 Sim. & Stu. 519, *sup.* 225); and the consequence therefore is, that any indenture of grant, executed by a contingent remainder-man or owner of an executory interest, would transfer such contingent or executory interest to the grantee, so that when the contingency happened the estate would vest in the grantee.

Mode adopted in practice of binding contingent interests.

But even admitting the force of these observations, perhaps, the cautious practitioner will still deem it prudent to adhere to the course which practice or legal adjudication has sanctioned. Before it had been decided that a fine *come ceo* &c. would operate to pass a contingent or executory interest in fee, (*vide ante*, 160), the usual course was, if lands were subject to limitations to A. for life, with remainder in fee to his children *living at his death*, and one of the children of A. during A.'s life sold his contingent share, he by a fine *sur concessit*, or, which we have seen is sufficient, by an indenture only, demised the lands for a long term (say a thousand years) covenanting to convey the fee when the estate vested. But now that the cases of *Doe* d. *Brune* v. *Martyn*, 8 B. & C. 497, *S. C.* 2 M. & R. 485, and *Doe* d. *Christmas* v. *Oliver*, 10 B. & C. 181, have established the point above alluded to, this circuity may be avoided, for the vendor may safely levy a fine *come ceo* &c. to the purchaser, which will effectually vest the estate when the contingency happens in him (*a*). If the contingent interest in such a case be sold to the person in whom the vested fee resides, it may be released; unless, indeed, according to the doctrine of some writers, such interests can only be devised or released where "the owner is ascertained;" see Prest. Abstr. 283; but *the fallacy of such a doctrine has been attempted to be shewn in a recent publication by the editor. See 1 Jarm. Pow. Dev. 30, n. If the objection be applicable at all, it would apply to the present case, (which indeed is admitted by Mr. Preston in another place, 3 Prest. Abst.

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(*a*) It should seem, however, according to the doctrine of *Hermitage* v. *Tomkins*, *sup.* p. 225, that it ought not to appear on the face of the deed that the lessor had no interest in the land.

GRANTS AT COMMON LAW.

255), for it is uncertain, during the life of A., whether any, or, if any, which of the children will become an object of the gift. Such an interest is clearly not *devisable*, for the same reason that it is not descendible, namely, because it cannot subsist *as such* after the death of the owner; for if a child survived A. the parent, the interest would vest, and if he died in A.'s life time, it would fail; so that the devise could never operate upon the property as a contingent interest. This principle, however, does not apply to conveyances *inter vivos;* and therefore, if there be no *other* reason why such an interest is not devisable, it follows that it may be released; and such, it is apprehended, is the sound conclusion upon the subject.

It should be noticed, that the preceding observations, as to the alienable quality of a contingent or executory interest, do no apply to the mere possibility or expectancy of an heir, which clearly cannot be transferred, *Wyvell's case*, Hob. 457, though, according to the doctrine of *Rawlyns's case*, *sup.* p. 224, we have seen that a demise, or, it should seem, any other *indenture*, *sup.* p. 226, would take effect by estoppel out of an interest subsequently acquired by this or any other means.

GRANT OF RENT CHARGE AS A QUALIFICATION.

GRANT OF RENT-CHARGE *for the Life of the Grantee, determinable on* ALIENATION (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*grantor*], of &c.,

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Who is qualified to kill game in respect of estate.

(*a*) The object of this grant is supposed to be to confer a qualification to kill game, under the stat. 22 & 23 Car. 2, c. 25, which subjects to certain penalties for killing game "every person not having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly value of 100*l. per annum*, or for term of life, or having lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of 150*l.*, (other than the son and heir apparent of an esquire, or other person of higher degree, and the owners and keepers of forests, parks, chases, or warrens, being stocked with deer or conies for their necessary use, in respect of the said forests, parks, chases, or warrens)." Upon this statute it has been held that the estate must be in possession, and not in reversion, *Mallock* v. *Eastly*, 7 Mod. 482, and must be of the annual value required, exclusive of charges, such as rents, interest of mortgages, &c. *Wetherall* v. *Hall*, Caldecott's Rep. 233; *S. C.* 8 D. & E.

of the one part; and [*grantee*], of &c., of the other part.—WHEREAS the said [*grantor*], in consideration of the natural love and affection which he bears towards his brother, the said [*grantee*], has proposed to give and grant unto him an annuity or clear yearly rent-charge of 150*l.* during his natural life (*a*), to be paid free from all deductions whatso-

GRANT OF RENT CHARGE AS A QUALIFICATION.

Recital, that in consideration of natural affection, the grantor had agreed to grant to the grantee,

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221, n.: but the interest may be legal or equitable. Ib. Copyhold lands too are clearly sufficient. The words of the statute might seem to import, that the requisition of 150*l.* a-year was confined to chattel leases, and that the 100*l.* a-year extended to the estate for life, as well as the estate of inheritance; but the contrary has been determined. Clergymen, therefore, in respect of their benefices, and other tenants for life, must have lands, &c. of the clear annual value of 150*l.*; *Lowndes* v. *Lewis*, Cald. Rep. 188; but, according to the opinion of Lord *Kenyon*, the estate for life may be held *pur autre vie*, 6 D. & E. 289; and it has been decided, that the chattel interest for ninety-nine years need not be absolute, but may be determinable with the joint lives of the lessee and other persons. Earl *Ferrers* v. *Henton*, 8 D. & E. 506. It will be observed that the eldest sons of esquires, and persons of higher degree, are not required to be qualified in point of estate, but this exception has been held not to extend to the parents themselves; *King* v. *Utley*, 1 D. & E. 45, n.; *Jones* v. *Smart*, 1 D. & E. 44; so that, though the eldest sons of serjeants at law, doctors, (deriving their degree from one of the English universities, *Jones* v. *Smart*, 1 D. & E. 44); persons holding his Majesty's commission, in which they are stiled *Esquires*, (but which does not extend to commissions to officers of volunteers signed by Lord Lieutenants of counties, *Talbot* v. *Eagle*, 1 Taunt. 510); barristers at law, &c. may kill game without any other qualification, yet the parents themselves, being of this rank, must be possessed of the property required by the statute. For information on the subject of the Game Laws generally, see Mr. Chitty's Treatise.

Sometimes grants, &c. are made for the purpose of qualifying the grantee for certain other duties and offices, to which the law has annexed qualifications of property; as, for the magistracy, to become members of Parliament, or to vote in the election of the latter. The present form will answer all such purposes, (though the editor would not be understood as recommending the adoption of these moral frauds upon the law), or any other purpose for which a simple grant of a rent-charge is wanted.

(*a*) *Or*, "during the joint natural lives of the said [*grantor*] and [*grantee*],"

which would clearly be sufficient. *Vide ante*, p. 227.

GRANT OF RENT CHARGE AS A QUALIFICATION.

ever, at the times and in the manner, but subject to the provisoes hereinafter mentioned; and to be issuing out of the capital messuage, farm, and hereditaments hereinafter particularly described, and of which the said [*grantor*] is seised in fee-simple, free from all incumbrances. NOW THEREFORE THIS INDENTURE WITNESSETH, That, for the considerations hereinbefore expressed, he the said [*grantor*] *Hath* given, granted, bargained, sold, and confirmed, and by these presents *Doth* give, &c. unto the said [*grantee*] [and his assigns (*b*)], one annual sum or yearly rent-charge of 150*l.* [of lawful money of the United Kingdom of Great Britain and Ireland], to be charged and chargeable upon, and yearly issuing and payable out of and from *(describe the messuage, lands, &c.); All* which said capital messuage, farm, lands, and hereditaments are of the yearly value of 500*l.* and upwards, clear of all deductions whatsoever. TO HAVE, HOLD, RECEIVE, TAKE, AND ENJOY the said annual sum or yearly rent-charge of 150*l.* hereinbefore granted and confirmed, or intended so to be, unto the said [*grantee*] [and his assigns] during his natural life (*c*), to be paid and payable by two equal half-yearly payments, in each and every year, on the several days following, (that is to say), the —— day of ——, and the —— day of ——, free and clear of, and without making any deductions or abatement whatsoever thereout, or out of any part thereof, for or in respect of any taxes, charges, assessments, or other impositions whatsoever; the first half-yearly payment of the said annual sum or yearly rent-charge of 150*l.* to be made on the —— day of —— now next ensuing, if the said [*grantee*] (*d*) *shall be then living, but subject, nevertheless, to the several provisoes hereinafter contained. *(Powers of distress and entry* (*a*), *ut ante*, Vol. II. p. 139, *omitting, throughout,*

his brother, a rent-charge of 150*l.* for life.

Testatum.

Grant of rent charge payable by half-yearly payments for the life of the grantee.

Habendum.

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Powers of distress, &c.

(*b*) These words should be retained, unless there is an absolute restriction on alienation, *ut post*, p. 230.

(*c*) *Or*, "during the joint natural lives of the said [*grantor*] and [*grantee*]."

(*d*) *Or*, "if the said [*grantor*] and [*grantee*]."

Powers of dis-

(*a*) Such powers, however, are clearly not necessary to the validity of

if the clause absolutely restrictive of alienation be retained, the words "and his assigns.") PROVIDED NEVERTHELESS, and it is hereby declared and agreed, that if the said [*grantee*] [without the consent in writing of the said [*grantor*] first obtained (*b*)], shall alien or dispose of the said annual sum or yearly rent-charge, hereby granted, or intended so to be, or any part thereof, or if the same or any part thereof shall, [without such consent], by any act of the said [*grantee*], or by operation of law (*c*), become vested, either at law or in equity, in any person or persons other than the said [*grantee*], then the same annual sum or yearly rent-charge, and every part thereof, shall thenceforth wholly cease and determine (*d*). IN WITNESS, &c.

GRANT OF RENT CHARGE AS A QUALIFICATION.

Rent charge to cease on alienation.

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the grant to confer a qualification. Indeed, a right to distrain is incident by law to a rent of this kind, under the stat. 4 Geo. 2, c. 28, s. 8, (*vide ante*, Vol. I. p. 608), as it is to a rent reserved upon a lease at common law. It is remarkable, that the practice of introducing such powers should have continued so long after the necessity for them has ceased. They have been discarded by many practitioners. It is well known, that such powers are rarely introduced in leases.

tress not necessary.

(*b*) If the restriction be thus qualified, the words "and his assigns" within brackets, should be inserted.

(*c*) Without some words to this effect, it is clear that the restriction would not extend to assignments by operation of law, as bankruptcy, &c. These few general words, however, are quite as operative to embrace such assignments, as the most careful enumeration; and to provide in terms for the bankruptcy or insolvency of persons whose rank and situation in life place them beyond the probable reach of such misfortunes, may appear absurd, and even be offensive. It is clear, beyond dispute, that at this day no objection can be made to the validity of provisions to cease at bankruptcy, *Lockyer* v. *Savage*, 2 Stra. 947, and other cases stated Jarm. Constr. Dev. 272, provided, it seems, they do not proceed from the trader himself. *Higinbotham* v. *Holme*, 19 Ves. 88.

As to providing against alienation by bankruptcy, &c.

(*d*) This clause seems to be useful in order to secure the property from falling into the hands of creditors, &c. and would not, it is conceived, affect the validity of the qualification. Another provision, sometimes inserted where the rent-charge is not intended to be beneficially enjoyed by the grantee, is, that the arrears beyond a certain amount, say one instalment, shall not be recoverable. In the opinion of some gentlemen, however, such a proviso affects the validity of the qualifica-

Observations on the restrictive clauses introduced into qualification deeds.

GRANT OF RENT CHARGE AS A QUALIFICATION.

tion; and although something may be urged in opposition to this opinion, it is better not to raise the question. The principal convenience arising from the provision is, that it exonerates the executors or administrators of the grantee from the necessity of calling for the arrears that may be due at his death, which otherwise they might be obliged to do in the execution of their duty, from which there might be no person competent to discharge them. To guard against this, the grantee should give receipts for the several payments as they become due; and, as a further precaution, in case this should be neglected, a clause should be inserted in his will, exonerating the estate from all arrears which may be due at his death; though it should be observed, that the arrears thus discharged would be liable to the probate and legacy duty, and the claims of creditors; so that the former mode of exoneration seems to be preferable. Where the interest granted does not terminate with the life of the grantee, some such precautions are necessary, in regard to the land itself; and a testamentary disposition seems to be the most convenient mode of revesting the property in the grantor, if the grantee should happen to die possessed of it; but if the property be a chattel interest, it will, (whether bequeathed or not), be liable, at the death of the grantee, to the probate and legacy duty, (or the corresponding duties applicable in the case of intestacy), and to the claims of creditors. So, even lands of inheritance, except copyholds, will be liable to the specialty debts of the grantee; and, if he were a trader, to his debts by simple contract. See stat. 47 Geo. 3, cap. 74, s. 2. For these reasons, estates which determine with the life of the grantee, are to be preferred, for the purpose in question, to those which are not so determinable; and of the latter, freeholds are to be preferred to leaseholds, and copyholds to both, as they cannot be affected by the debts of the grantee, at his death, nor indeed by judgments obtained in his life-time; freeholds and leaseholds, on the other hand, are subject to judgments even in the life-time of the grantee, and where the inheritance or absolute interest is vested in him, this cannot be prevented by any restriction on alienation: in regard to *bankruptcy*, copyholds are in the same predicament. The best species of qualification, therefore, is a copyhold limited for life only, and determinable on alienation, by voluntary acts, or by operation of law.

Precautions to be taken by the grantee.

Comparative advantages of the several species of qualification.

These are all the guards that can be thrown round persons who make grants for the purposes under consideration, in relation to the claims of third persons; against the grantee himself, no efficient protection can be provided; for, should he dishonestly attempt to assume his legal proprietory rights, the doors of the Courts of Justice are necessarily closed against the injured party, who, upon his own representation, was guilty, as *particeps criminis*, of a fraud upon the law. *Doe* d. *Roberts* v. *Roberts*, 2 Barn. & Ald. 387; and see *Curtis* v. *Perry*, 6 Ves. 747; but see *Platamore* v. *Staple*, Geo. Coop. 250. Persons, therefore, making such grants, should

be apprised that their sole reliance is on the honour of the other party. It seems, however, that equity will not afford its aid to a person claiming under a deed of this nature; see *Coal* v. *Butcher*, 2 Jacob, 565, which was a suit by the grantee to obtain possession of the deed from his father's (the grantor's) devisees in trust; he (the father) having retained it in his own possession, and not even communicated the fact of its execution to the son; and Sir *T. Plumer*, who expressed an opinion against the plaintiff's claim, retained the bill for a year, with liberty to the plaintiff to bring an action.

GRANT OF RENT CHARGE AS A QUALIFICATION.

It remains only to be observed, that as these grants of rent-charges are voluntary, and not made for a "pecuniary consideration, or money's worth," they need not be enrolled; *vide ante*, Vol. I. p. 335; and the mention of a nominal pecuniary consideration (which, however, may as well be avoided) would not be material. See *Ince* v. *Everard*, 6 D. & E. 545.

Voluntary grants of annuity do not require enrolment.

GRANT *of a* REVERSION *in* FEE *in Lands, with the Introduction of a new Description of the Parcels, according to a recent Survey; also a Memorandum indorsed for the Purpose of proving the Existence of the particular Estate* (*a*).

GRANT OF A REVERSION IN FEE.

THIS INDENTURE, made the —— day of ——, BETWEEN [*grantor*], of &c. of the one part; and [*grantee to uses*], Parties,

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(*a*) Although, as before observed, a lease and release, or bargain and sale enrolled, is in general the most eligible assurance for the conveyance of reversions and remainders, in order to avoid the necessity of proving the existence of the particular estate; yet, where the transaction is small, and the additional expense is therefore an object, it seems desirable, if possible, to adopt some mode of proving, on the face of the deed, the existence of the particular estate, so as to remove the objection to a conveyance by *grant*. Where the person on whose life that estate depends, is willing to concur, this may be done by procuring his signature to the deed, merely by way of attesting the fact of his existence, as in the above precedent. Except in inconsiderable transactions, probably the difference of expense will not be considered of sufficient importance to induce a resort to this expedient; but let it be remembered, that by far the larger

Suggested mode of removing the objection to conveying reversions by grant.

GRANT OF A REVERSION IN FEE.

of &c. of the other part. WHEREAS, by indentures of lease and release, bearing date, respectively, the —— and —— days of ——, the release being made between [*settlor*], of &c., of the first part; [*husband*], of &c., (eldest son of the said [*settlor*]), of the second part; [*wife by maiden name*], spinster, (now [*wife by nuptial name*],) of the third part; and [*trustees*], of &c., of the fourth part; in consideration of a marriage then intended (and which was afterwards duly solemnized) between the said [*husband*] and [*wife by maiden name*], the said [*settlor*] did convey and assure unto the said [*trustees*] and their heirs, *(describe *the parcels)* (*a*) *To hold* the same unto the said [*trustees*], their heirs, and assigns, To the following uses, (after the solemnization of the said intended marriage), that is to say, *(recite uses to the settlor for life, remainder to the husband for life, remainder to the wife for life, remainder to trustees to preserve, remainder to the first and other sons of the marriage in tail male, remainder to the daughters in tail general, as tenants in common, with reversion to the right heirs of the settlor).* AND WHEREAS the said [*settlor*], by his last will and testament in writing, bearing date &c., duly executed for the devise of freehold (*b*) estates, devised all his lands and hereditaments (which included the reversion in fee in the lands comprised in the said hereinbefore in part recited indenture of settlement), unto and to the use of his sons, the said [*grantor*] and [C. D.]

Recital of marriage settlement.

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Recital of devise of reversion.

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number of transactions in conveyancing are of a minor character. In such cases, another suggestion may be deemed worthy of attention—Dower, it is well known, does not attach to remainders and reversions. Where, therefore, a married man is entitled to a remainder or reversion in fee, he may, by limiting it to uses to prevent dower, before it falls into possession, effectually exclude the dower, so as to render it unnecessary to have recourse to a fine, if he should have occasion to sell or mortgage it, after it has become an estate in possession.

(*a*) The parcels are described here because the lands are conveyed in the present deed by a new description.

(*b*) "Freehold" is a more correct term than "*real* estate," as the latter includes copyholds, which will pass without an attestation by three witnesses.

GRANT OF A REVERSION IN FEE.

their heirs and assigns for ever, as tenants in common: AND WHEREAS the said [*settlor*] died on the —— day of ——, without revoking or altering the devise in his said will; which will, soon after his decease, was proved in the Prerogative Court of the Archbishop of Canterbury. —Death of testator.

AND WHEREAS by indentures of lease and release, bearing date, respectively, the —— and —— days of ——, respectively made between the said [C. D.], of the one part, and the said [*grantor*], of the other part, the undivided moiety and share devised to the said [C. D.] by the will of the said [*settlor*], as hereinbefore recited, of and in the said reversion in fee-simple in the said messuages or tenements, lands, and hereditaments hereinbefore mentioned, was limited and assured unto and to the use of the said *[*grantor*], his heirs and assigns for ever (*a*). —Conveyance to grantor.

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AND WHEREAS the only issue of the said marriage of the said [*husband*] and [*wife*] consisted of three children, namely, [B. A.], who was born on the —— day of ——, 1780, and died an infant on the —— day of ——, 1782; [C. A.], who was born on the —— day of ——, 1781, and died also an infant, on the —— day of ——, in the same year; and [D. A.] who was born on the —— day of ——, 1782; and died a bachelor on the —— day of ——, 1803; all which children were severally interred in the burial ground of the parish church of ——. —Failure of issue of the marriage.

AND WHEREAS the said [*husband*] departed this life on the —— day of ——, and was interred in the burial ground of the parish of ——, leaving the said [*wife*] surviving him, who is now living, as will appear by a memorandum to be indorsed on these presents (*b*). —Death of husband.

NOW THIS INDENTURE WITNESS- *Testatum.*

(*a*) These recitals are inserted for the purpose of exemplifying a concise mode of reciting the effect of deeds and wills, instead of introducing a detailed statement of the contents of those instruments. It was formerly usual to make the recital of an instrument almost a transcript of it; but the practice (though not wholly abandoned) is falling much into disuse among the most intelligent practitioners. As to mode of framing recitals.

(*b*) Where the person having the immediate freehold is the grantee of the reversion, no objection can be made to a conveyance by grant without any such precaution as here suggested.

GRANT OF A REVERSION IN FEE.

ETH, that, for limiting and assuring the reversion or remainder in fee-simple expectant on the decease of the said [*wife*], of and in the messuages or tenements, lands, and hereditaments, hereinbefore and hereinafter described, to the uses hereinafter expressed, and in consideration of the sum of 5*s.* to the said [*grantor*] in hand paid by the said [*grantee*], at or before the execution of these presents (the receipt whereof is hereby acknowledged),

Grant.

He, the said [*grantor*], *Hath* granted, bargained, sold, and confirmed, And by these presents *Doth* grant, &c.

Reversion.

unto the said [*grantee*], and to his heirs, ALL THAT the reversion or remainder in fee-simple expectant and to take effect in possession upon the decease of the said [*wife*] (*a*), of and in all and singular the said messuages or

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Variation where there are other mesne estates.

(*a*) As, by the death of the husband, the limitation in favour of the children of the marriage had become impossible to take effect, the reversion is limited as simply expectant on the estate for life of the widow, or rather on the estate in remainder limited to the trustees, determinable with her life. If the grant had been made during the life of the husband, the reversion would have been thus described—

"All that reversion or remainder in fee-simple, expectant on the decease of the said [*husband*] and [*wife*], his wife, and upon failure of the sons and daughters of the said [*husband*], on the body of the said [*wife*] begotten or to be begotten, and of the issue male of such sons, and the issue general of such daughters."

Variation where the remainder is immediately expectant on the estate for life.

If there had been no estate interposed in trustees to preserve contingent remainders, but the reversion had been immediately expectant on the estate for life of the widow, the most correct terms of describing the reversion would have been—

"All that reversion or remainder in fee, expectant on the decease of the said [*wife*], or on the sooner determination of her said estate for life."

These words would be improper in the present instance, because, on the determination of the tenant for life's estate, otherwise than by death, the lands would vest in the trustees.

Mode of conveying reversions and remainders by lease and release.

It may moreover be noticed, that, where lands held in reversion or remainder are granted by lease and release, they should not be described as a reversion or remainder; but the lands simply should be granted, expressly subject to the subsisting estate or estates of freehold.

tenements, lands and hereditaments hereinbefore described, but which said premises having been recently surveyed, it has been found that the quantities stated in the aforesaid description thereof, contained in the said recited indenture of settlement, greatly exceed the real and actual quantities thereof, and that the same premises are more accurately described as follows: namely *(parcels according to modern description)*; and also of and in all houses, &c., and all the estate, &c. TO HAVE AND TO HOLD the said reversion or remainder hereinbefore expressed to be *hereby granted, of and in the said messuages or tenements, lands and hereditaments, hereinbefore described, with their and every of their rights, members, and appurtenances, unto the said [*grantee*], his heirs and assigns, for ever. *(Insert uses to prevent dower, or otherwise, as the case may be.)*

GRANT OF A REVERSION IN FEE.

Reference to modern description.

Habendum.

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Uses.

To be indorsed on the preceding Grant (a).

MEMORANDUM, that I [*tenant for life*], the tenant for life of the hereditaments, the reversion in fee whereof is granted by the within-written indenture, at the request of the within-named [*grantor*], have subscribed my name hereto, for the purpose of proving and recording the fact of my existence. *As witness* my hand, this —— *(day after the date of the grant)* day of ——, 18—.

Memorandum to be indorsed.

Witnesses to the signature of the said [*tenant for life*].

[*Tenant for life*].

[*Witnesses*].

(a) Where an indorsed memorandum is referred to in a deed, care should be taken that it is comprised within the quantity of matter which the stamp of the deed admits of; as, possibly, the Courts might consider such an indorsement as "matter put or indorsed thereon," within the meaning of the stat. 55 Geo. 3, c. 184. The memorandum denoting the names of the parties, &c., shortly indorsed on the deed, for the sake of convenience, has been held *not* to be included. *Winder* v. *Fearon*, 4 Barn. & Cress. 663.

As to an indorsed memorandum being included in the stamp duty.

GRANT OF AN ADVOWSON UPON TRUST TO SECURE AN ANNUITY.

GRANT *of an* ADVOWSON *in Fee,* UPON TRUST *for* SALE, *to secure a Redeemable* ANNUITY, *the Grantee of a similar Annuity being paid off out of the Consideration Money for the present Annuity; Provisions for the Investment of the Proceeds of the Sale, Upon Trust to secure the Annuity, and, subject thereto, for the Grantor* (*a*).

Parties.

THIS INDENTURE, made &c., BETWEEN [*former annuitant*], of the first part; [*present grantor*], of the

(*a*) This form answers a two-fold object; it exhibits the mode of granting an advowson for *any* purpose, and also the manner of securing an annuity by such a grant, which has this peculiarity, that, being an incorporeal hereditament, the annuity cannot issue out of it, so that it is an annuity properly so called, and not a *rent*. Property of this kind, therefore, can only be rendered available as a security, by means of sale (for in the case of the benefice becoming vacant, the grantee would be bound to present the nominee of the grantor), and, consequently, advowsons are not considered as eligible securities.

Invalidity of special bonds of resignation established.

Here it may be observed, that the question as to the validity of a special bond to enforce the resignation of a benefice by an incumbent, in favour of particular persons, as the sons or brothers of the patron (which is discussed at great length in the former edition of this work, *ante*, Vol. III. p. 362), has been lately settled by a decision of the House of Lords, establishing beyond controversy the invalidity of these bonds. The opinions of Lord *Eldon* and the majority of the Judges who concurred in this conclusion, were founded principally on the argument (which appears to be unanswerable), that, as every resignation of a benefice by the incumbent is general, under whatever circumstances or stipulations such resignation may have been induced, and the patron is not bound in law to present the person in whose favour the bond is expressed to be made, special bonds of this kind are not to be distinguished in principle from general bonds of resignation, which, since the celebrated case of the Bishop of *London* v. *Ffytche*, 3 Burn's Eccl. Law, 356, are admitted on all hands to be bad. *Fletcher* v. Lord *Sondes*, 3 Bingh. 501; 1 Bligh, New Series, 144. The

second part; and [*grantee*], of the third part: WHEREAS, by virtue of an indenture of grant, bearing date the —— day of ——, in the year ——, and made between the said [*grantor*] of the one part; and the said [*former annuitant*], of the other part, the advowson and hereditaments hereinafter described, with their appurtenances, were granted, conveyed, and assured unto and to the use of the said [*annuitant*], his heirs and assigns, for ever; Upon certain trusts for securing to the said [*annuitant*], his executors, administrators, and assigns, an annuity, or clear yearly sum of £——, during the natural life of the said [*grantor*], subject to a declaration or agreement for the repurchase of the said annuity by the said [*grantor*], upon giving three calendar months' notice to the said [*annuitant*], his executors, administrators, or assigns, and payment to him or them of the sum of 500*l.*, and all arrears of the said annuity, and a proportional part thereof up to the time of the repurchase of the said annuity: AND WHEREAS the said [*grantor*] has contracted with the said [*grantee*] for the sale of an annuity or clear yearly sum of 100*l.* during the lives of [*three nominees*], at the price of 1200*l.* AND WHEREAS the said [*grantor*] has given notice to the said [*annuitant*] of his intention to repurchase the said annuity, according to the provision in the said recited indenture; and it has been agreed between the said parties, that the sum of 500*l.*, which is payable for the repurchase thereof, according to the terms of the said recited provision, shall be paid to the said [*annuitant*], out of the said sum of 1200*l.*, the purchase-money for the said annuity of 100*l.*: AND WHEREAS upon the treaty for the sale of the said annuity of 100*l.*, it was further agreed that the same should be secured by a grant to the said [*grantee*], his heirs, and assigns, of the said advowson and hereditaments

GRANT OF AN ADVOWSON UPON TRUST TO SECURE AN ANNUITY.

Recital of former grant.

Recital of contract for sale.

That former annuitant is to be paid off.

That present annuity is to be secured by grant of the advowson.

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opinions of the Judges in this case, which were delivered *seriatim*, in consequence of the difference of opinion that existed among them, are recommended to the reader's perusal. It is satisfactory to announce an adjudication by the highest authority, and upon the soundest principles, of a point on which a great difference of opinion had prevailed in the profession. The law on the subject is now regulated by the stat. 9 Geo. 4, c. 94, stated *ante*, Vol. III. p. 366, 2nd edit.

GRANT OF AN ADVOWSON UPON TRUST TO SECURE AN ANNUITY.

hereby granted, or intended so to be; Upon the trusts, and for the intents and purposes hereinafter expressed: And whereas all arrears of the said annuity of 50*l.* secured to the said [*annuitant*] as aforesaid, with a proportional part thereof up to the day of the date of these presents, have been paid by the said [*grantor*] to the said [*annuitant*], as the said [*annuitant*] hereby acknowledges.

That arrears of former annuity have been satisfied.

Testatum. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of 500*l.* of lawful British money (being part of the said purchase-money of 1200*l.*), paid by the said [*grantee*], by the direction of the said [*grantor*], to the said [*annuitant*], at or before the execution of these presents; And also in consideration of the sum of 700*l.* of like lawful money (being the remaining part of the said purchase-money), paid by the [*grantee*] to the said [*grantor*], at or before the execution of these presents, the receipt of which said several sums of 500*l.* and 700*l.* the said [*annuitant*] and [*grantor*] hereby respectively acknowledge, and from the same sums, and from every part thereof respectively, hereby respectively acquit, release, and for ever discharge the said [*grantee*], his executors, administrators, and assigns, the said [*annuitant*], by the direction of the said [*grantor*], *Hath* granted, bargained, and sold, and by these presents *doth* grant, &c. And the said [*grantor*] *Hath* granted, bargained, sold, ratified, and confirmed, and by these presents *doth* grant, &c. unto the said [*grantee*], his heirs and assigns, All that the advowson, presentation, and right of donation, nomination, free disposition and right of patronage, of, in, and to the rectory, parsonage, or parish church of ——, aforesaid, with all the buildings, tenements, glebe-lands, tithes, hereditaments, rights, members, privileges, claims, advantages, and appurtenances whatsoever, to the said rectory belonging or appertaining; And also *all* the estate, right, title, interest, claim, and demand whatsoever, both at law and in equity, of the said [*annuitant*] and [*grantor*], and each of them, in or to, or out of the said advowson, hereditaments, and premises, or any part of the same; And *also* all deeds, &c. in the custody of the said [*annuitant*] and [*grantor*], or either of them, or which they, or either of them, can procure with-

Grant by former annuitant and present grantor.

Advowson.

All the estate, &c.

GRANT OF AN ADVOWSON UPON TRUST TO SECURE AN ANNUITY.

out suit: To HAVE AND TO HOLD the said advowson and hereditaments, and all and singular other the premises hereby granted, or intended so to be, unto the said [*grantee*], his heirs and assigns, To THE ONLY PROPER USE of the said [*grantee*], his heirs and assigns, for ever; *Upon the trusts* nevertheless, and for the intents and purposes hereinafter expressed, (that is to say), UPON TRUST for securing to the said [*grantee*], his executors, administrators, and assigns, an annuity or yearly sum of 100*l.* during the lives of the said [*nominees*], and the life of the longest liver of them, by quarterly payments, to be made on the —— day of ——, in every year, by equal portions, without any deduction or abatement for any present or future taxes, or any other account whatsoever; the first of the said quarterly payments of the said annuity or yearly sum of 100*l.* to be made on the —— day of —— now next ensuing, in case the said [*nominees*], or any or either of them, shall be then living, with a proportional part of the said annuity up to and inclusive of the day of the death of the survivor of the said [*nominees*], in case he or she shall die before the first quarterly day of payment, or afterwards, in the interval between any two of the said quarterly days of payment; such proportional part of the said annuity to become due upon the death of such survivor, and to be paid within one calendar month afterwards, clear of all deductions, as aforesaid; AND in case the said annuity or yearly sum of 100*l.* shall at any time hereafter be in arrear and unpaid for the space of forty-two days after either of the days hereinbefore appointed for the payment thereof, *Then (Trust for sale and investment of the purchase-money, and covenants to pay the annuity*, ut ante, Vol. I. p. 551; *also covenants for title, and agreement for repurchase*, ut ante, Vol. I. p. 551).

Habendum.

To the use of grantee in fee.

Upon trust for securing annuity, &c.

Proportional part.

GRANT OF LIBERTY OF WAY.

GRANT *of a* RIGHT *or* LIBERTY *of* WAY, *through a certain Road, with Horses, Carriages, &c.* (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*grantor*], of &c., of the one part; and [*gran-*

Suggestions in granting rights of way.

(*a*) In granting or reserving rights of way, the following particulars require attention: *First*, to describe with distinctness, whether it is a foot-way, horse-way, carriage-way, or drift-way, which is intended; a horse-way includes a foot-way, and a carriage-way a horse-way; but it seems that a carriage-way (and *à fortiori* a horse-way) does not necessarily include a drift-way, *i. e.* a way for driving cattle. See *Ballard* v. *Dyson*, 1 Taunt. 283. Nor is it always clear whether a horse-way extends to horses laden, or is a bridle-way only. See *Trickey* v. *Yeandall*, 9 J. B. Moore, 55. Care should also be taken to mention with precision the course and direction, and, in some cases, the dimensions of the way, which may be conveniently done by reference to a plan, *ut post*, p. 247. Another consideration is, at whose expense the way is to be kept in repair. It is clear that, in the absence of any stipulation, the grantor of a right of way is not bound to repair it; *Pomfret* v. *Ricroft*, 1 Saund. 321; and though an express authority to make repairs is generally given to the grantee, it by no means follows of course that an obligation to repair arises from this permission.

What amounts to a grant of a right of way, &c.

The Courts have given a liberal interpretation to grants of easements of this description. Thus, in *Holmes* v. *Seller*, 3 Lev. 305, where A. covenanted and agreed with B., his heirs and assigns, that it should be lawful to them at all times to have and use a way through and over a close of A., in consideration of which B. covenanted and agreed to pay to A. 20*s.* at the execution of the agreement, and also to pay 6*d.* to him and his heirs, and also to repair the gate between their closes: It was held that this amounted to a grant of a right of way, and not to a covenant merely. So, in Lord *Mountjoy's case*, 1 And. 307; *S. C.* Moor. 174; Godb. 17, the following clause in a bargain and sale enrolled in fee, from Lord M. to J. and B., and the heirs of J., was held to amount to a grant, or rather a reservation: "Provided always, and it is covenanted, granted, concluded, and agreed between the said parties;

tee], of &c., of the other part, WITNESSETH, that in consideration of *(state consideration)*, the said [*grantor*], GRANT OF LIBERTY OF WAY. Grant of right of way.

and the said J. and B. and their heirs covenant to and with the said Lord M., his heirs, &c. that it shall be lawful for the said Lord M., his heirs, &c. at all times hereafter, to have, take, and dig in and upon the heath ground of the premises, from time to time, sufficient ores, &c. for making allom or copperas, and to build, &c., without interruption of the said J. and B. and their heirs."

Right to dig coals, &c. not exclusive, when.

It is important to observe, that the grant of a right to dig coals, &c. over the land of another (and the same principle of course applies to rights of way), does not confer an *exclusive* right. Thus, in Lord *Mountjoy's case*, 4 Leon. 147, it is stated that, notwithstanding the reservation to him, the owner of the soil (*i. e.* the grantees) might dig there. And in *Chetham* v. *Williamson*, 4 East, 269, where A. mortgagee in fee, and B. the owner of the equity of redemption, conveyed lands to C. in fee, at an annual fee-farm rent, C. covenanting that it should be lawful for B. and his heirs to enter and dig for coal or any other mineral, and to carry away the same, allowing out of the rent to C., his heirs, &c. a deduction for damage thereby done to the premises, the question was, whether this reservation or grant gave to B. the exclusive right to dig for coals, or, in other words, operated to except the coal out of the grant: and the Court held that it did not, Lord *Ellenborough* observing, "that no case can be named where one who has only a liberty of digging for coals in another's soil, has an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him."

In this case it will be observed, that the right was not reserved to the person from whom the grant, *i. e.* the legal estate, proceeded, as in Lord *Mountjoy's case*, but to the owner of the equity of redemption, who was for this purpose a stranger. This circumstance, however, though much adverted to in the argument, seems not to vary the principle. Whether it be a grant or reservation the intention must govern the construction.

Right of way, &c. cannot be created except by deed.

According to the doctrine before stated, it is clear that a right of way, or any other easement out of land, cannot be created or transferred except by deed. Thus, in *Fentiman* v. *Smith*, 4 East, 107, A., the plaintiff, alleged that he had a cotton-mill near two rivulets, called T. and B., the water of B. flowing into T. by means of a tunnel, or goit, a little above A.'s mill, and that by reason of his possession of the mill he had a right to the use of the rivulets. The injury complained of was that S., the defendant, had diverted the stream B. from flowing through the tunnel: it appeared that the tunnel had been made over part of an old road, which had been purchased by the defendant about eight years ago for a guinea, and who at that time agreed to allow the plaintiff, for the same price, to lay the tun-

GRANT OF LIBERTY OF WAY.

for himself, his heirs and assigns, hereby covenants and grants with and to the said [*grantee*], his heirs and assigns,

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nel there for the purpose of conveying the water to the mill; and that the defendant assisted at the making of the tunnel, under the plaintiff's direction, *but no conveyance was made of the land to the plaintiff*. It was objected by the defendant, that this, being a right claimed over the land of another, could not pass without deed; and that the declaration, which stated that the plaintiff had a right to the goit, *by reason of his possession* of the mill, was untrue, as the plaintiff had it, if at all, by virtue of the agreement, which being by parol only was inoperative to confer such a right. Lord *Ellenborough* held that the allegation could not be sustained, without shewing that the *appurtenances* were legally such; and his Lordship said, that the title to have the water flowing in the tunnel over the defendant's land could not be supported *without deed.*

Action not maintainable on parol license to construct a drain.

So, in *Hewlins* v. *Shippam*, 5 B. & C. 221, 7 D. & R. 783, where it appeared that A., the owner of an inn at C., which he had recently rebuilt, being desirous of constructing a drain in the adjoining premises, belonging to B., it was agreed between them that he should be at liberty to do so, in consideration of his agreeing to raise the chimnies, and pave the yard of B.'s premises; which was done, and the drain constructed. On an action for stopping the drain so made, *Graham*, B., was of opinion, that the right claimed under the license granted by B. to. A. was an uncertain interest in land, within the first section of the statute of frauds, and, not being by writing, conferred a right at will only, which was determined by the defendant stopping up the drain. He, therefore, directed a nonsuit, with liberty to enter a verdict. On the matter being brought before the Court, it was contended that the plaintiff acquired no interest in the land where the drain was situate, but a mere easement, namely, the right of having the water run over it, and that, therefore, it was not within the statute. The Court, however, refused to set aside the nonsuit, on the ground that, allowing it to be an easement, and not an interest in the land, such a right *could not be created without deed.* Mr. Justice *Bayley*, (who delivered the judgment of the Court), considered it to be immaterial for what period the right was intended to be enjoyed, (see also Shepp. Touchst. 230), for the rule extended as well to chattel as to freehold interests; but as the declaration in this case was expressed in such terms as, in the opinion of the learned judge, denoted a freehold interest, the case did not raise the point. (See farther as to parol license, *Winter* v. *Brockwell*, 8 East, 308).

Grant of easements presumed, when.

In both the preceding cases, the duration of the enjoyment of the easement was too short to warrant the presumption of a grant; but where such a right has been enjoyed for a long period, (and twenty years is established to be the period requisite for the purpose, see *Darwin* v. *Upton*, cit. 3

that it shall be lawful for the said [*grantee*], his heirs and assigns, and his and their agents and servants, and the

GRANT OF LIBERTY OF WAY.

D. & E. 159; *Campbell* v. *Wilson*, 3 East, 294; *Wright* v. *Howard*, 1 Sim. & Stu. 203), the law will presume a grant from the mere length of enjoyment. This principle, however, it should be observed, only applies where the person from whom the grant is supposed to have proceeded, had power to make it; and therefore, in a late case, where an action was brought for the obstruction of certain ancient windows, which had existed more than twenty years, and it appeared that the grant of the right so obstructed must have been made, if at all, by the incumbent of a rectory, and he having no power to make such a grant, so as to bind his successors, it was held that the presumption did not arise. *Barker* v. *Richardson*, 4 B. & A. 579.

Windows in London.

It is to be observed, too, that, in London, the presumption of a grant from twenty years' possession of windows is excluded by the custom, which requires that there should exist some "writing, instrument, or record of an agreement." See 2 Swanst. 339, and cases there referred to.

Equitable relief in case of obstruction.

Equity will grant an injunction to prevent the obstruction of lights, or the enjoyment of any other easement founded on an actual or presumed grant, *Cherrington* v. *Abney*, 2 Vern. 646; *Ryder* v. *Bentham*, 1 Ves. Senr. 543; *Morris* v. Lord *Berkley*, 2 Id. 453; *Attorney-General* v. *Nicholl*, 3 Mer. 687, where the injury to be prevented might be irreparable; but not where the consequence would be merely a deterioration of value, which might be compensated in damages in an action at law. *Attorney-General* v. *Nicholl*, 16 Ves. 338; *Wynstanley* v. *Lee*, 2 Swanst. 33; see also *Fines* v. *Cobb*, 2 Vern. 116.

Easements extinguished, when.

By *non-user*.

It is further to be observed, that the principles which govern the presumption of grants of incorporeal hereditaments, apply also to their extinction. Thus, a right of way which existed upwards of twenty years ago, but has not been used for that period, will be presumed to be surrendered, "as a man will naturally enjoy what belongs to him." See Lord *Erskine's* judgment in *Hillary* v. *Waller*, 12 Ves. 265.

Extinction of rights of way by unity of possession.

And here it may be noticed, that where a right of way, and the land over which it extends, become united in the same person, the way is extinct, *Dell* v. *Babthorpe*, Cro. El. 300; *S. C.* Owen, 121; *Wright* v. *Rattray*, 1 East, 377; *Morris* v. *Eggington*, 3 Taunt. 24, (see also, as to lights, *Robins* v. *Barnes*, Hob. 175), and is not revived by a subsequent grant or devise of the land with which it was formerly enjoyed, distinct from the land over which it extends. *Whalley* v. *Thompson*, 1 Bos. & Pull. 371.

Distinction in regard to ways of *convenience* and ways of *necessity*.

But the doctrine of extinguishment by unity of possession has been considered as confined to cases where the way is one of *convenience* only, and not of *necessity*, necessary ways being, it is said, revived by a subsequent grant of the land to

GRANT OF LIBERTY OF WAY.

tenants and occupiers for the time being of the messuage and farm of the said [*grantee*], called ——, hereinafter mention-

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which they belong. See Hob. 131; Vent. 97; Saund. Rep. 323 a, Serj. Wms. n.; *Buckby* v. *Coles*, 5 Taunt. 211; but see 9 J. B. Moore, 181. But this seems not to be an accurate statement of the principle; for if the way be essential to the enjoyment of the land, it passes by the conveyance of the land, independently of the fact of its prior existence, according to the well-known and long-established rule, that "where the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same;" Co. Litt. 56. a., Saund. 322 a; and therefore, that "where a man having a close which is surrounded by his own land, grants the close to another, the grantee shall have a way to the close over the grantor's land, *as incident to the grant;* for without it he cannot derive any benefit from the grant." 1 Wms.'s Saund. 322 b; see also *Sury* v. *Piggott*, Poph. 172; *Packer* v. *Welsted*, 2 Sid. 39; *Staple* v. *Heydon*, 6 Mod. 4; *Chichester* v. *Lethbridge*, Willes, 72; *Howton* v. *Frearson*, 8 D. & E. 50. And so *vicé versâ*, *i. e.* "where he (the grantor), grants the (surrounding) land, and reserves the close to himself†." 1 Wms.'s Saund. 322 b; and see *Clark* v. *Cogge*, Cro. Jac. 170; *Dutton* v. *Tayler*, 2 Lutw. 1487; but see 8 D. & E. 56. In the case before suggested, therefore, the way derives its *origin* from the new grant, and is not *revived* by it.

Right of way, ceases with the necessity which gave rise to it.

It has lately been decided, that where a right of way, which passes as incident to land, becomes, from subsequent circumstances, as, by the acquisition of other land on the part of the grantee, no longer essential to the enjoyment of the land, the right ceases; *Holmes* v. *Goring*, 9 J. B. Moore, 166; "otherwise," said Lord Chief Justice *Best*, "a party conveying his lands might retain a right of way over one thousand acres of another's soil, although, by a subsequent purchase, he might be enabled to reach his place of destination by merely passing over one hundred yards of his own lands, and without touching that of his neighbour."

Grantee not to go *extra viam* in case of obstruction.

It remains only to be observed, that the grantee of a right of way is not at liberty, in the case of a temporary obstruction of it, by floods or other inevitable accident, to go through another part of the grantor's land, dur-

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† Upon principle it is not easy to see any distinction between the rights which belong to the grantor in respect of land *retained*, and those which pertain to the grantee in respect of land *granted;* though certainly some of the *dicta* make a distinction in favour of the latter, upon the principle, it is presumed, that a grant is to be taken most strongly against the grantor. See Lord Chief Justice *Holt's* judgment, in *Tenant* v. *Goldwin*, 2 Lord Raym. 1093.

GRANT OF LIBERTY OF WAY.

ed, and all and every other persons and person, for his and their respective benefit and advantage, from time to time, and at all times for ever hereafter, at his and their respective will and pleasure, by night and by day, and for all purposes, to go, return, pass and repass with horses, carts, waggons, and other carriages, laden or unladen, and also to drive cattle and other beasts, in, through, along, and over a certain road or way lately formed and fenced off by the said [*grantor*], out of, and from, and intersecting certain closes or fields, called ——, in the parish of ——, in the county of ——, belonging to him the said [*grantor*] in fee-simple, and which said road or way is of the width of fourteen feet or thereabouts, and leads from the turnpike road, or public highway, opposite or adjacent to the said messuage and farm of the said [*grantee*], called ——, in the village of ——, in the parish of —— aforesaid, unto and towards a certain road or lane, communicating with the farm and lands of the said [*grantee*], called ——, in the parish of ——, in the said county of ——, and the same road or way, the right or liberty of passing over which is hereby granted, and the course and direction thereof are more particularly described in a map or plan indorsed on these presents; AND THAT it shall be lawful for the said [*grantee*], his heirs and assigns, to make and lay causeways, or otherwise to repair and amend the same, as there shall be occasion; AND the said [*grantee*], for himself, his heirs and assigns, hereby covenants with the said [*grantor*], his heirs and assigns, that he the said [*grantee*], his heirs and assigns, will, from time to time, and at all times hereafter, at his or their own costs and expense, repair and amend, and keep repaired and amended, in a proper, substantial, and workmanlike manner, the said road or way, the right of passing in and over which is hereby granted, and also the

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Covenant to keep way in repair, &c.

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ing the period of such obstruction; in which respect private ways differ from public ways; see *Taylor* v. *Whitehead*, Doug. 716; *Bullard* v. *Harrison*, 4 Mau. & Selw. 387; "because it is for the public good, that a passage should be afforded to the subjects at all times, but the same necessity does not exist in the case of a private way." *Per* Lord *Ellenborough*, 4 M. & S. 393. As to the mode of pleading rights of way, &c., see 2 Selw. N. P. 1279, where the points are stated with this author's usual succinctness and perspicuity. See also *Looker* v. *Halcomb*, 12 Moore, 410.

GRANT OF LIBERTY OF WAY.

gate erected by the said [*grantor*] across the said road, at the northern end or extremity thereof, and the lock and fastening belonging thereto, and will, from time to time, and at all times hereafter, at the like cost and expense of the said [*grantee*], his heirs or assigns, repair and renew the quickset hedge and fence lately planted by the said [*grantor*], on both sides of the said road or way; and also that he the said [*grantee*], his heirs or assigns, and his and their agents and servants, and the tenants and occupiers for the time being of the said messuage and farm, called ——, using the said road or way, will, from time to time, and at all times, immediately after he or they shall have used and passed through the said gate, shut and lock the same. IN WITNESS, &c.

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GRANT OF AN ANCIENT FOOTWAY.

GRANT *of an* ANCIENT FOOTWAY *belonging to a Messuage (granted by the present Indenture, which had been extinguished by Unity of Possession with the Lands over which it extended (a), (introduced into a Conveyance of a Messuage, Garden, and Orchard, from A. to B. in fee.)*

AND whereas the said [*grantor*] and [*grantee*] have been advised that the right or liberty of using a certain ancient and accustomed footway, leading from the southern extremity of the garden belonging to the said messuage or dwelling-house, through and across certain closes or fields of the said [*grantor*], called ——, unto or towards the parish church of ——, and which formerly belonged and was appurtenant to the said messuage, garden, orchard and premises hereby released, or some or one of them, may have become extinct by reason of the ownership and possession of the said messuage, &c., to which the said right or liberty of way is appurtenant, and of the closes or lands over which the same extends, having both become vested in the said [*grantor*]; and as the same

(*a*) As to this see *ante*, p. 245.

GRANT OF AN ANCIENT FOOTWAY.

right or liberty of way is convenient to the enjoyment of the said messuage or dwelling-house, garden, and orchard, it has been agreed that the same shall be granted unto the said [*grantee*], his heirs and assigns, in the manner hereinafter mentioned. NOW THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of the said agreement, and for the considerations hereinbefore expressed, the said [*grantor*] *Doth* hereby for himself, his heirs, executors, administrators, and assigns, grant, covenant, and agree to and with the *said [*grantee*], his heirs [*250] and assigns, that it shall be lawful for the said [*grantee*], his heirs and assigns, and the tenants and occupiers for the time being of the said messuage or dwelling-house, garden, orchard, and premises hereby released, or intended so to be, or any of them, or any part thereof, and his and their servants, and all and every other persons and person thereunto authorized by him and them, from time to time, and at all times hereafter for ever, at his and their respective will and pleasure, to go, return, pass, and repass from the said messuage or dwelling-house, garden, and orchard hereby released, or intended so to be, through and across the several closes of land or fields called ——, which now belong to the said [*grantor*] in fee-simple, by and along the said ancient and accustomed path or footway formerly appurtenant to or enjoyed with the said messuage or dwelling-house, garden, orchard, and premises, or some or one of them; and that it shall be lawful for the said [*grantee*], his heirs and assigns, and the tenants and occupiers for the time being of the said messuage or dwelling-house, garden, and premises, or any of them, or any part thereof respectively, peaceably and quietly to use and enjoy the said path or footway, in as full and ample a manner, to all intents and purposes whatsoever, as the said A. B. *(a former owner of the estate sold)*, or any former owners or occupiers of the said messuage or dwelling-house, garden, orchard, and premises, has or have at any time or times heretofore used and enjoyed the same (*a*). IN WITNESS, &c.

(*a*) See further as to Grants, titles "INDEMNITY," and "PURCHASE;" and INDEX TO THE PRECEDENTS, title "GRANT."

DEEDS FOR THE INDEMNITY OF PURCHASERS AGAINST CHARGES, &c.

INDEMNITY.

Indemnity among purchasers *inter se* in respect of charges common to all.

ONE of the most frequent occasions on which deeds of this nature are required is, where lands, which are subject to a rent-charge or other annual incumbrance, are sold in several lots, under a stipulation that the whole of such charge shall be borne by the purchaser of a particular lot, or shall be distributed among the several purchasers in certain proportions. In such case, as the arrangement is among the purchasers themselves only, the incumbrancer himself being no party to it, the whole of the lands continue liable to *him;* and it therefore becomes necessary to devise the most effectual means of indemnifying the purchasers intended to be exonerated against the consequences of such liability, by investing them with a power of resorting to the property of the purchaser upon whom it is intended the weight shall fall. The mode of effecting this has undergone some variation in modern practice. The plan formerly was simply to reserve a power of distress for the sums which the purchaser should be called upon to pay, and all expenses: but it is now usual to limit a rent-charge out of the lands intended to be exclusively charged, adequate at least to the amount of the original charge, with powers of distress, and for the perception of rents in case of non-payment; and this rent, where there are several purchasers, is vested in trustees to be exercised for the benefit of all, in order to prevent the necessity of incumbering the land with a distinct rent to *each* purchaser, which would otherwise be necessary. To this rent sometimes is added a limitation of a term of years, with trusts to raise the money by mortgage and sale, as in ordinary annuity deeds; but such a provision clearly cannot be required, and the requisition, if made, ought never to be submitted to. The question as to the provisions which are proper in deeds of this kind was much discussed in the case of *Casamajor* v. *Strode*, 2 Swanst. 347, which was as follows:—

Case of *Casamajor* v. *Strode*.

In pursuance of a decree of the Court of Chancery, certain estates were sold by auction, in forty-seven lots. The eighth condition of sale was expressed in these words:—"The estates comprised in the foregoing particular are subject to the perpetual payment of 120*l.* a-year to the curate or chaplain of Northaw; but the same, and the perpetual annual payment of 20*l.* to the hospital of Cheynes, in Buckinghamshire, are in future to be

charged upon, and paid by the purchaser of Lot 1 only." Lot 1 was purchased by P. Thompson, and five other lots by J. H. P. Schneider. A reference was directed to the Master, to inquire whether a good title could be made to the lots purchased by Schneider; and, on the 26th of July, 1816, by an order to which Schneider was no party, a further reference was directed to the Master, to approve a deed of indemnity from Thompson to the purchasers of the other lots against the annual payments of 120*l.* and 20*l.* On the 7th of May, 1817, the Master reported, that a good title could be made to the lots purchased by Schneider; and to this report Schneider excepted. The deed of indemnity approved by the Master, (an indenture between Thompson, of the first part; Casamajor and Fowler, trustees for sale of the estates, of the second part; all the purchasers at the sale, except Thompson, of the third part; and P. A. H., and J. J., of the fourth part;) after reciting the title of the vendors, the particulars of the annual payments amounting to 20*l.* and 120*l.*, the decree and sale, the conveyance of Lot 1 to Thompson, and the subsequent proceedings, witnessed, that Thompson, at the request of the trustees for sale, charged all the premises comprised in Lot 1 with the payment of the annual sums amounting to 20*l.* and 120*l.*, in exoneration of all other tenements, &c. liable to the payment; and for better effectuating such charge, Thompson conveyed to H. and J., their heirs and assigns, for ever, a clear annuity or yearly rent charge of 140*l.*, issuing out of the premises comprised in Lot 1, payable quarterly, the first payment to be made on the 25th of March then next, with a power of distress on non-payment for twenty days after any quarterly day of payment, and a power of entry and perception of rents on non-payment during thirty days. The deed contained a declaration, that the rent charge of 140*l.* was granted upon trust, in case the several parties named in the schedule, (the purchasers at the sale), or any of them, their or any of their heirs or assigns, or any persons claiming under or in trust for them, or any other persons for the time being entitled to, or in possession of, the premises comprised in the several lots mentioned in the schedule, or any part thereof, should at any time thereafter be compelled to pay and satisfy the several annuities thereinbefore charged exclusively on the premises out of which the annuity of 140*l.* was thereby granted, or any of them, or any part thereof respectively, or any arrears thereof, or should incur or sustain any costs, charges, damages, or expenses on account thereof; then, from time to time as the same should happen, upon trust that H. and J., or the survivor, his heirs or assigns, should from time to time, when lawfully required, by and out of the yearly rent charge thereby granted, by raising and *levying the same, or any part thereof, under the powers therein contained, [*253] or by such other means as to them should seem meet, (but not until such notice as thereafter mentioned should have been given), raise and levy all and every such sum and sums of money, losses, costs, damages, and

DEEDS FOR THE INDEMNITY OF PURCHASERS AGAINST CHARGES, &c.

Casamajor v. *Strode.*

Deed of indemnity.

Recitals.

Grant of rent-charge, &c.

Declaration of trusts.

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Cassmajor v. *Strode.*

expenses whatsoever, as the several parties named in the schedule, or any of them, or any or either of their heirs or assigns, or any person claiming under or in trust for them, or any other persons for the time being entitled to, or in possession as aforesaid, should have been compelled to pay, or have sustained, or incurred, as aforesaid; and all costs and expenses which H. and J., or the survivor of them, or the heirs or assigns of such survivor should have incurred in or about levying and satisfying such monies as aforesaid, or otherwise in or about the execution of the trusts of the deed, and pay and dispose of the monies so levied accordingly, so as well and effectually in all things to indemnify the parties of the third part, their heirs, executors, &c., and all persons claiming under them respectively, or otherwise, as aforesaid, their respective lands and tenements, goods and chattels, against the said yearly payments of 20*l.* &c., respectively, and all arrears and future payments thereof, and all contributions, claims, and demands whatsoever on account thereof. A further declaration followed, that no sums of money should be raised under the trusts, unless H. & J., or the survivor of them, his heirs or assigns, should have previously given to Thompson, his heirs, appointees, or assigns, one calendar month's notice, or more, of his or their intention to raise the same, and of the amount to be raised, such notice to be in writing, signed by H. and J., or the survivor of them, his heirs or assigns, and delivered to Thompson, his heirs &c., or left at his or their usual or last place or places of abode; and that H. & J., and the survivor, &c., should permit the persons for the time being beneficially entitled to the premises thereby charged with the rent charge, to retain the rent charge until the trusts before declared should arise, or require to be performed; and also to retain and receive the surplus of the rent-charge which should remain, and not be applied in or towards the execution of the trusts before declared. The deed also included a separate covenant by Thompson, with each of the parties named in the schedule, their heirs, executors, &c., and with every such other person for the time being entitled or in possession as aforesaid, that Thompson, his heirs, appointees, or assigns, should from time to time pay and satisfy the several annuities of 20*l.*, &c., when they should become due, and effectually indemnify the several parties named in the schedule, their heirs, executors, &c., and all persons claiming under or in trust for them, and all persons for the time being entitled or in possession, as before mentioned, and their respective estates and chattels, and especially the lands purchased by them at the said sale, against all *the annuities, and all arrears and future payments thereof, and against all actions, suits, claims, loss, charges, and expenses, &c., by reason of non-payment of the annuities, or any part thereof, by Thompson, his heirs, appointees, or assigns, or any distress or other proceeding, claim, or demand, on account of the same. Other clauses authorized the trustees to retain their expenses out of the trust money, and empowered a surviving trustee to appoint new

Notice to grantor prior to distress.

Covenant to pay charge;

and indemnify purchasers therefrom.

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trustees. It was objected, first, that the purchasers were entitled, upon the terms of the 8th condition, to an absolute exoneration by act of Parliament; and if not, that, secondly, the indemnity provided by this deed was inadequate. On the first point, Sir *T. Plumer*, M. R., held, that the purchasers having bought with knowledge that all the estates were charged with inalienaable annuities, were not entitled to require an exoneration by act of Parliament. "The fair import of the 8th condition of sale," his Honor observed, "is an indemnity *inter se*, not as against the owners of the rent-charge, who were no parties to the transaction. The nature of the arrangement is, that the charges are to remain as affecting the whole estate; but that the purchasers of all the other lots are to be indemnified by the purchaser of the first lot. Such seems the reasonable construction, and conformable to the practice in similar cases. When an estate is sold subject to a liability, as for the repairs of a chancel, the liability is frequently transferred to one lot; but no one ever heard of an act of Parliament for that purpose." In regard to the other question, his Honor, on a subsequent day, said, "The purchasers have a right to be protected to the full extent to which protection can be given, by an arrangement imposing liability on one lot alone:" (and after some observations as to Schneider's not having been heard upon the subject of the deed before the Master), he continued: "Some of the objections which have been alleged (to the deed), are not of much weight, as that a term of years should be created instead of a rent-charge in fee; the contrary would have afforded a stronger objection, namely, an indemnity limited to a number of years. It is clear that a right of entry and distress, to reimburse to the purchasers the annuity paid, and the costs incurred by them, might be granted without the creation of any estate in the lands on which the distress was to be exercised, as in the case somewhat resembling the present, stated from Moore, in 6 Viner, 393, pl. 11; but here is a perpetual rent-charge in fee, with power of entry and distress, and perception of rent till the arrears are paid. A stronger objection, and one not entirely removed, is, that a rent-charge, merely co-extensive in amount with the original annuities, is not sufficient. Under the terms of this deed the purchasers of the rest of the estates are not to call on the owner of Lot 1, until they have been compelled to make payment; but all resistance to the demands of the owners of the original rent-charges, every distress and litigation, must be attended with expense. On the death [*255] of the two persons appointed trustees, an expense may be incurred in ascertaining their heir. *It is difficult to maintain, that, by providing to the extent of the rent-charges, sufficient provision is made for costs and expenses.* All charges are to be paid from 140*l.* a-year; that can hardly be considered an adequate security. *What objection is there to give a right of distress for that sum, and so much more as may be necessary to provide for all expenses?* That seems requisite to complete indemnity. It is suggested,

Sir *T. Plumer's* judgment.

DEEDS FOR THE INDEMNITY OF PURCHASERS AGAINST CHARGES, &c.

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that some part of the original rent-charges has been already paid, and that the indemnifying rent-charge is therefore an accumulating fund: that is for the consideration of the Master, in determining whether an addition should be made either in the phrase or in the amount, for securing a complete indemnity against every liability to which neglect or resistance may give occasion in any future time. The number of trustees is also a subject of doubt. Before any steps are taken for the indemnity of the purchasers, notice is to be given by the trustees or their heirs to the owner of Lot 1. If they are absent from the kingdom, or if any difficulty arises in determining who is heir, or if the heir is an infant, what remedy have the purchasers? A better provision should be made for the nomination of the trustees, with the concurrence of the persons interested in the trust.

"Some of these inconveniences may be removed by increasing the number of trustees, and authorizing the purchaser called on for payment to give notice instead of the trustees, and rendering it imperative on the trustees immediately to levy the amount stated in the notice. It will deserve consideration also, whether the deed of indemnity should not be in some way notified to all future purchasers of Lot 1, as by an indorsement on the purchase-deed, and whether the purchasers of the rest of the estates should not have copies of it, in order to know to whom they must resort for indemnity. The deed seems extremely well framed, but may admit some improvement to render it a better security to the petitioner." His Honor, therefore, ordered that the exception taken by Schneider to the Master's report, so far as related to the title of the premises taken by him, be overruled; and that it be referred back to the Maater to review his report, and revise, and, if he judged necessary, alter the deed of indemnity; which deed, so revised and altered, should be executed by Thompson.

Against this order an appeal was made to the Lord Chancellor, who, after the case had been argued before him, approved the deed as prepared, and made the following order, which has been kindly communicated to the editor by Mr. Jacob.

Lord Chancellor's order on appeal.

The Lord Chancellor ordered "that the exception taken by Schneider to the Master's report, dated the 7th of May, 1817, approving the title to the lots purchased by Schneider, should be overruled; and that [*256] *the order made by the Master of the Rolls, on hearing the said exception, dated the 26th of March, 1819, should be affirmed, so far only as related to the overruling of the said exception. And his Lordship declared that the deed of indemnity, bearing date the 24th of March, 1817, particularly mentioned or recited in the Master's report of the 3rd of March, 1817, as having been settled by him in pursuance of an order of the 26th of July, 1816, and which deed of indemnity had already been executed by P. Thompson, *was a proper deed of indemnity* from the said P. Thompson, as the purchaser of Lot 1, for indemnifying all the other persons who had become purchasers of the residue of the estates, from the payment of the

annual outgoings of 120*l.* and 20*l.*, in compliance with the 8th article of the conditions of sale, under which the said estates were sold." Reg. Lib. A. 1820, fol. 2136.

DEEDS FOR THE INDEMNITY OF PURCHASERS AGAINST CHARGES, &c.

Observations upon *Casamajor* v. *Strode*.

The principal point of controversy in this case was, whether an indemnifying rent-charge, of equal amount with the original charge, afforded an adequate security against the expenses which might be incurred by the non-payment of the latter. The negative was strongly maintained by the able counsel for the purchasers, on the ground, that, as the whole of the indemnifying rent would be exhausted in reimbursing them the sums paid on account of the charge itself, there would be no surplus for expenses: to which it was answered, that some instalments on the original charge having been satisfied since the period from which the new rent was to run, there would always be an arrear of the latter applicable to the payment of costs; and with this answer, it should seem, from Lord *Eldon's* order, (though it did not distinctly appear from his observations at the hearing), his Lordship was satisfied.

Without dwelling upon the obvious objection, that a gross definite sum can hardly be considered as a certain security against an indefinite expense, (and the expense incident to a *perpetual* rent-charge is manifestly such), it may be sufficient to observe, that, under the ordinary mode of preparing deeds of indemnity of this kind, the new rent-charge commences at the period from which the original charge, against which it is to be a security, is unsatisfied; and to such a case the reasoning adopted in *Casamajor* v. *Strode* (assuming that it satisfactorily disposed of the objection in *that* instance,) does not apply. In the case suggested, it is obvious, that if default were made in the *next* succeeding payment due, a purchaser with a rent of equal amount only would have no remedy for the expense he may have incurred, except upon the covenants, until some future payment of the original charge should be made out of its proper fund, which might never happen: for the purchaser who was to bear the charge might go on making default from time to time, and thereby accumulating expenses. Sir *Thomas Plumer's* mode of supplying this deficiency was, to give the exonerated purchaser a power of distress for the expenses *ultra* the rent; and the only objection to this scheme, (for it is generally admitted that such a power *may* be given), seems to be, that there is an apparent incongruity in creating a rent-charge for the purpose of indemnity, and which is assumed, upon the face of this engrafted provision, to be inadequate to the purpose; and if a power of distress can, and correctly may, be given without a rent, in any event, why is a rent created at all, and why is not the whole amount of the sums paid, whether on account of the charge itself, or the incidental expenses, made recoverable according to the old mode, by distress simply?

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One remark is suggested by these considerations; namely, that in all cases where an adequate and satisfactory provision is not made for every

DEEDS FOR THE INDEMNITY OF PURCHASERS AGAINST CHARGES, &c.

possible expense to be incurred, the trusts should be so framed as to give rise to as little expense as possible. The indemnified purchaser should not be obliged to wait until a distress is actually levied, but should be authorized to pay the charge, when due, without distress, and without notice; for as such provisions are usually inserted at the instance of, and in order to secure the onerated purchaser, they may fairly be withholden, unless he will provide an ample security against the expenses consequent on them.

GRANT OF RENT CHARGES IN ORDER TO EXONERATE OTHER LANDS.

GRANT *of two* PERPETUAL RENTS *to* TRUSTEES, *out of a* MESSUAGE, &c. *(contracted to be sold), in order to* EXONERATE OTHER HEREDITAMENTS *from certain* ANNUAL CHARGES *payable out of the whole.*

Parties.

THIS INDENTURE, made &c., BETWEEN [*grantor*], of &c., of the one part; and [*grantees*], of &c., of the other part.

Recitals.

WHEREAS the said [*grantor*] is seised of or entitled to the capital messuage or mansion-house, and other the hereditaments hereinafter described, with their appurtenances, and the inheritance thereof in fee-simple, subject, with other hereditaments of or belonging to the said

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*[*grantor*], to the payment of a rent or yearly sum to the vicar for the time being of the vicarage church of [A.], in the county of [B.], which yearly rent or sum did not formerly exceed the yearly sum of 10*l.*, but the same hath since been increased to the yearly sum of 25*l.*, by virtue of an act of Parliament made and passed in the —— year of the reign of his present Majesty, intituled "An act &c. &c.," by which it was, amongst other things, enacted, that the rent or yearly sum of 25*l.* of lawful money of Great Britain, clear of all deductions whatsoever, should be issuing and going out of all the lands and grounds that should, in pursuance of that act, be allotted to [A. B.]; to be paid and payable by the said [A. B.], his heirs and assigns, out of such his share and allotment to ——, and his successors, vicars of the said vicarage church of [A], for the time being for ever, in the porch of the said church, by equal half-yearly payments in every year, to wit, on

—Of rent payable to vicar, &c.

—Act of Parliament.

&c., with power of enforcing the payment of the said yearly rent or sum by distress and entry; and by which act it is also enacted, that the said yearly rent or sum of 25*l.* should be in full satisfaction and compensation for, as well the said yearly payment or stipend of 10*l.*, so payable as aforesaid, and for all other yearly payments due or payable to the vicar for the time being of —— aforesaid, for all manner of tithes, dues, and duties whatsoever, payable to the said —— and his successors, vicars of the said parish church of [A.], for and in respect of all his and their small vicarial and other tithes, arising, renewing, and yearly increasing, not only in or out of the lands and grounds intended to be inclosed, in pursuance of that act, but also in or out of all other the lands and hereditaments within the parish of [A.], save and except mortuaries, Easter offerings, and surplice fees. AND WHEREAS the title of the said [*grantor*] to the hereditaments charged with the payment of the said yearly rent or sum of 25*l.*, and also charged with the payment of 10*s.* 4*d.* yearly, for procurations and synodals, is derived through the said [A. B.]; AND WHEREAS the said [*grantor*] hath lately contracted for the sale of the said messuage or manor-house, and hereditaments hereinafter described, together with the hereditaments charged with the payment of the said yearly *rent or sums of 25*l.* and 10*s.* 4*d.*, and it is intended by the said [*grantor*], that the said messuage, &c. hereinafter described, shall be exclusively charged with the payment of the said yearly rents or sums of 25*l.* and 10*s.* 4*d.* in exoneration of the other hereditaments charged therewith; And upon the treaty for the sale of the said messuage, &c. hereinafter described, the said [*grantor*] did stipulate with the purchaser thereof, that such purchaser and his heirs should exclusively pay the said yearly rents or sums of 25*l.* and 10*s.* 4*d.* respectively. NOW THIS INDENTURE WITNESSETH, that, to the intent that all and singular the hereditaments charged with and subject to the payment of the said yearly rents or sums of 25*l.* and 10*s.* 4*d.* (except the hereditaments hereinafter described and hereby charged therewith), And also that the said [*grantor*], his heirs and assigns, and the purchaser and respective purchasers of all or any part of the said here-

GRANT OF RENT CHARGES TO EXONERATE OTHER LANDS.

Derivation of title.

Contract for sale and intention to charge the hereditaments sold exclusively with the payment of the annual charges.

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Testatum.

Consideration.

GRANT OF RENT CHARGES TO EXONERATE OTHER LANDS.

ditaments, (except as aforesaid), and his, her, and their heirs and assigns, may be henceforth exonerated and indemnified from the said yearly rent or sum of 25*l.* so payable to the vicar for the time being of the parish church of [A.] aforesaid; And from the said annual sum of 10*s.* 4*d.* payable for procurations and synodals; And in consideration of 5*s.* to the said [*grantor*] in hand paid by the said [*grantees*], at or before &c., the receipt &c., he the said [*grantor*] *hath* given, granted, and confirmed, and by these presents *doth*, &c. unto the said [*grantees*], their heirs and assigns, for ever, Two several annuities or clear yearly rents or annual sums of 25*l.* and 10*s.* 4*d.*, of lawful money of Great Britain, to be yearly issuing, payable, received, and taken by the said [*grantees*], their heirs and assigns, out of and from, and to be charged and chargeable upon, ALL THAT (*parcels*), &c. TO HAVE, HOLD, receive, perceive, and enjoy the said several annuities, clear yearly rents or annual sums of 25*l.* and 10*s.* 4*d.* and every part thereof respectively, unto the said [*grantees*], their heirs and assigns, for ever; the same respectively to be payable and paid at or in the porch of the said parish church of [A.], in the said county of [B.], by two equal half yearly payments, between the hours of ten and twelve of the clock in the forenoon of the several days following, [*260] *that is to say, the —— day of ——, and the —— day of ——, in every year, free from taxes, and without any other deduction whatsoever; the first payment of each of the said annuities or yearly rents to be made on the —— day of —— next ensuing. PROVIDED ALWAYS, *and it is hereby agreed and declared* between and by the said parties hereto, and particularly the said [*grantor*], for himself, his heirs, executors, administrators, and assigns, doth hereby grant, covenant, and agree to and with the said [*grantees*], their heirs and assigns, that in case each or either of the said annuities, yearly rents, or annual sums of 25*l.* and 10*s.* 4*d.* hereby respectively granted, or any part thereof respectively, shall happen to be behind and unpaid by the space of fourteen days next over or after either of the said days or times hereby appointed for payment thereof, and whereon the same ought to be paid as aforesaid, then (*continue powers of distress and entry*, ut ante, Vol. II. p. 139,

Grant of two several rents of 25*l.* and 10*s.* 4*d.*

Habendum.

Place and times of payment.

Power of distress and entry.

140, except *that such powers will here be limited to the grantees, their heirs and assigns)*; AND IT IS HEREBY AGREED AND DECLARED between and by the said parties hereto, that they the said [*grantees*], their heirs and assigns, shall and do stand seised of and interested in the same several rent-charges hereinbefore granted, and every part thereof respectively, with the remedies hereinbefore reserved for the recovery thereof respectively; IN TRUST thereby and therewith to save harmless and keep indemnified the said [*grantor*], his heirs, appointees, and assigns *(a)*, and the lands and other hereditaments charged by virtue of the said recited act, or otherwise, with the payment of the said yearly rent or sum of 25*l.* payable to the vicar for the time being of the parish church of [A.] aforesaid, by virtue of the same act, (except the said messuage, &c. hereinbefore described, and hereby charged with the payment of the *said yearly rents or sums of 25*l.* and 10*s.* 4*d.* hereby respectively granted as aforesaid), and the owner or respective owners for the time being of all or any of the said lands or other hereditaments (except as aforesaid), of and from the payment as well of the said yearly rent or sum of 25*l.* by the said recited act made payable to the said vicar of the parish church of [A.] for the time being, as of the said yearly sum of 10*s.* 4*d.* for procurations and synodals; And for that purpose, in case default shall at any time or times hereafter be made in payment of the said yearly rent or sum of 25*l.*, made payable by virtue of the said recited act as aforesaid, or any part thereof, at or on the days by the same act appointed for payment thereof, or in payment of the said annual sum of 10*s.* 4*d.* for procurations and synodals, on the days or at the times on which the said sum of 10*s.* 4*d.* shall be payable, then, and so often as the same shall happen, UPON TRUST that the said [*grantees*], their heirs or assigns, shall and do, immediate-

GRANT OF RENT CHARGES TO EXONERATE OTHER LANDS.

Declaration of trusts.

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(*a*) In this instance, it will be seen, the deed of indemnity is executed preparatory to the sale of the lands intended to be exonerated; but sometimes it is contemporaneous with or subsequent to the conveyances to the purchasers; in which case the purchases are recited, or, if numerous, are referred to by a schedule annexed to the indenture, *ut post*, p. 273.

As to the sales of the exonerated lands being contemporaneous or subsequent.

GRANT OF RENT CHARGES TO EXONERATE OTHER LANDS.

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ly after such default being made (*a*), recover and receive the said yearly rents or sums of 25*l.* and 10*s.* 4*d.* *respectively, hereby granted as aforesaid, or either of them, as the case may happen, and shall and do pay the same yearly rent or sum of 25*l.*, and the arrears thereof, or so much thereof as shall be sufficient for that purpose, unto the vicar of [A.] aforesaid, in or towards payment and satisfaction of the said yearly rent or sum of 25*l.* by the said recited act made payable to the said vicar of the said parish church of [A.], for the time being, as aforesaid, or so much thereof as shall be then due and owing, or in arrear; And also receive and pay the said annual sum of 10*s.* 4*d.*, or so much thereof as shall be then due and owing or in arrear, to the person or persons for the time being entitled to receive the same, in discharge of such procurations and synodals as aforesaid. And subject, and without prejudice to the payment of the said yearly rent or sum of 25*l.* by the said act made payable as aforesaid, and of the said yearly sum of 10*s.* 4*d.* for procurations and synodals, UPON TRUST that the said [*grantees*], their heirs and assigns, shall and do stand seised of and interested in the said yearly rents or sums

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(*a*) This provision is framed in conformity with the suggestion before made, *ante*, p. 257, that where a rent equal only in amount to the original charge is created, the grantee ought not to be compelled to suspend his resort to it, until the payment of the original charge has been enforced by a distress, and expenses thereby incurred, against which there is no *certain* security. Where it is intended that the indemnifying trust shall not be called into exercise, unless the original charge has been paid by coercion, the form of the trust will be—

Variation where the original charge is not to be paid without compulsion.

"That in case the said [*purchasers*]†, or any of them, their or any of their heirs or assigns, shall at any time or times hereafter be forced or compelled, by the levying of any distress or distresses on their respective lands and hereditaments, or the lands and hereditaments of any of them, or by any other legal compulsory means, to pay the said yearly rent-charge," &c.

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† It is in this clause supposed that the conveyances are recited as suggested in the last note.

of 25*l.* and 10*s.* 4*d.* respectively hereby granted, or so much thereof respectively as shall not from time to time be applied for the purposes aforesaid, IN TRUST for the person or persons for the time being entitled to the said messuage, &c. hereinbefore described, and hereby charged with the payment of the said yearly rents or sums respectively granted as aforesaid, his, her, or their heirs, executors, administrators, or assigns. PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties, that if the said [*grantees*], or either of them, or any future trustee or trustees, to be appointed in the place or stead of them or either of them, as hereinafter is mentioned, or their or any of their heirs or assigns, shall happen to die, or become unable or unwilling to act in the trusts hereby in him and them respectively reposed as aforesaid, then, and in every such case, and so often as the same shall happen, it shall be lawful for the surviving or continuing trustees or trustee for the time being, or, if there shall be no such surviving or continuing trustee or trustees, then for the retiring trustee or trustees, or the heirs or assigns of the last surviving or any other deceased trustee, and they and he are and is hereby required, by any writing under their or his hands and seals, or hand and seal, from time *to time, to nominate and appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying or being unable or unwilling to act as aforesaid, and that so often as any new trustee or trustees shall be nominated as aforesaid, the said yearly rents or sums of 25*l.* and 10*s.* 4*d.* respectively hereby granted, with the powers and remedies for enforcing the payment thereof respectively, shall be thereupon conveyed and assured, so that the same may be effectually vested in the surviving or continuing trustee or trustees thereof, and such new trustee or trustees, or if there shall be no continuing former trustee, then in such new trustees only, and their heirs, upon the same trusts as are hereinbefore declared concerning the same yearly rents or sums respectively (*a*). [PROVIDED ALSO, and it is hereby further agreed

GRANT OF RENT CHARGES TO EXONERATE OTHER LANDS.

Power to appoint new trustees.

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(*a*) Wherever trusts are created for objects even of a temporary dura- Remarks on

GRANT OF RENT CHARGES TO EXONERATE OTHER LANDS.

and declared between and by the said parties, that if any vacancy or vacancies shall occur in the trust hereby created

powers to appoint new trustees.

tion, a power to appoint new trustees is now inserted as a matter of course, in order to prevent the trust from falling into the hands of incapable or unwilling persons; and this is the more necessary in the case of an *ever*-enduring trust, as in the present instance. The modes of limiting such powers are various: sometimes they are vested in the continuing, sometimes in the retiring trustee; and in the case of settlements and wills, the power is frequently given to, or to be exercised with the consent of the persons beneficially entitled; indeed, it is obviously reasonable, that these persons should have a voice in the selection of those who are to be intrusted with their property. Where the power of nomination resides in the trustees exclusively, it should never be given to the continuing trustee alone, for by vesting the power in him, one of the objects of having a plurality of persons in the trust, namely, that one should be a check upon the other, may be defeated, since the continutng trustee, if he were dishonestly disposed, would select for his coadjutor a person who would further his designs. These observations, however, are of less force in such a trust as the present, where no principal sum is placed at the disposal of the trustees; and the consequence, therefore, of any malversation would be so inconsiderable, and so certain of detection, as to render any attempt of the kind extremely improbable. In such cases the principal object is to provide for every possible event which can create a vacancy. If the power was certain to be exercised in every single vacancy, it would be sufficient to provide for the death, retirement, or incapacity of *one* trustee; but as the remaining trustee may die, or himself become incapable, without having exercised the power, it is necessary to extend the provision to the death, incapacity, or refusal (for a retiring trustee sometimes refuses to make such an appointment,) of both.

Trustee cannot transfer his office unless authorized so to do.

It may not be amiss to observe, while touching upon the subject of these powers, that the effect of a trustee transferring the trust property to another person, without an express authority, is, that though the property changes hands, the trust does not; for the office, with all its powers and responsibilities, still resides in the person nominated by the author of the trust. No trustee, therefore, ought to be advised to take a step, by which he restricts his control over the property without diminishing his responsibility, every act of his nominee being, in construction of law, the act of himself. If a trustee, without an express authority, (and such an authority the powers as ordinarily framed very seldom confer), transfers the trust property to his co-trustee, intending to retire from the trust, he is responsible for all the consequences of this unauthorized act; and therefore, if the co-trustee, who is thus invested with the sole power over the trust proper-

GRANT OF RENT CHARGES TO EXONERATE OTHER LANDS.

by any means not provided for in and by the power hereinbefore contained, or if the said power shall not be efficient and available to supply any vacancy or vacancies arising in the said trust, by reason of the death, refusal, or incapacity to exercise the same, of the person or persons in whom such power is vested, then and in such case, and from time to time, so often as the same shall happen, it shall be lawful for the owner or owners for the time being of any estate or interest in possession, in the hereditaments hereby intended to be indemnified from the payment of the said rents or sums of 25*l.* and 10*s.* 4*d.* respectively, payable thereout as aforesaid, or of two-third parts of the aggregate value thereof, by any such writing or writings as aforesaid, to nominate and appoint any person or persons to supply the said vacancy or vacancies; and upon every such nomination and appointment the said yearly rents or sums respectively hereby granted shall be conveyed and assured, in the manner declared in the power lastly hereinbefore declared (*a*)]. IN WITNESS, &c.

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ty, abuses that power, by dealing improperly with the funds, the trustee who has enabled him to do so is answerable. *Wilkinson* v. *Parry*, 4 Russell, 272. See observations on the power of changing trustees, *post*, Vol. 6, page 488.

(*a*) This clause may be adopted or not as may be thought expedient. The former clause provides for every *ordinary* exigency.

INDEMNITY BY GRANT OF RENT CHARGE BY WAY OF USE.

RELEASE *in* FEE *to* TRUSTEES, *to the* INTENT *that they might receive a* RENT-CHARGE (*a*), *with Powers of Distress and Entry, and to apply the same by Way of* INDEMNITY *for the Benefit of* CERTAIN PURCHASERS; *with* PROVISO *for the Cesser of the* TRUSTS. *Limited Covenants for Title by* Cestui que Trust. *Special* POWER *of* APPOINTING NEW TRUSTEES.

Parties

THIS INDENTURE, made the —— day of ——, BETWEEN [*grantors, trustees for sale*], of the first part; [*cestui que trust*], of the second part; [*purchaser*], of the third part; [*second purchaser*], of the fourth part; and [*grantees*], of the fifth part.

Recital of will.

WHEREAS, (*recital of a will vesting lands in the grantors in fee upon trust, to be sold with the consent of cestui que trust*).

Of conveyances to purchasers.

AND WHEREAS, (*recital of a conveyance of a messuage by the grantors to* [*first purchaser*], *to uses to prevent dower*). AND WHEREAS, (*recital of a like conveyance of a messuage to* [*second purchaser*]). AND WHEREAS the said messuages and other hereditaments respectively comprised in, and intended to be conveyed by the said several hereinbefore recited indentures of lease and release, together with the messuage and other hereditaments hereinafter particularly mentioned and intended to be hereby released, (being other part of the said hereditaments devised by the said recited will), are subject to a yearly rent-charge of 4*l.* 10*s.* 6*d.*, payable to the parson and churchwardens of the parish of Saint ——, within the city of London, for the benefit of

(*a*) A rent-charge is usually created by way of use, in the two following cases: *first*, where the land, subject to the rent, is limited by the same deed; and *secondly*, where, as in the present instance, it is intended that the grantor shall not be personally charged. As to the remedies for the recovery of annuities, *vide ante*, Vol. I. p. 579.

the poor there, for ever; and it has not been made clear to the said [*first purchaser*] and [*second purchaser*] respectively, that they may not be subject to the payment of other yearly charges of small amount. AND WHEREAS, previously to the completion of the aforesaid sales, it was agreed between the said [*grantors*] and the said [*first purchaser*] and [*second purchaser*], that the said several yearly rents should be charged on the messuage or tenement, and other hereditaments hereinafter described, and intended to be hereby released, with their appurtenances, exclusively and in exoneration of the said messuages or tenements, and other hereditaments so sold to the said [*first purchaser*] and [*second purchaser*] respectively, as aforesaid; and in order thereto, it hath been agreed that a yearly rent-charge of twenty pounds, to be issuing and payable out of the said messuage or tenement, and other hereditaments hereinafter described, with the usual powers of distress and entry for enforcing the payment thereof, shall be limited in use to the said [*grantees*], their heirs and assigns, upon and for the trusts, intents, and purposes hereinafter declared concerning the same. NOW THEREFORE THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, and also in consideration of ten shillings, &c. they the said [*grantors*], with the consent and approbation of the said [*cestui que trust*], and upon the nomination and appointment of the said [*first purchaser*] and [*second purchaser*], (testified by their severally executing these presents), *Have*, and each of them *Hath* bargained, sold, and released; and by these presents *Do*, &c. And the said [*cestui que trust*] *Hath* granted, bargained, sold, released, and confirmed, and by these presents *Doth* grant, &c. unto the said [*grantees*] and their heirs, (in the actual possession, &c.), *All that*, &c. [*parcels*], TO HAVE AND TO HOLD the said messuage or tenement, hereditaments, and all and singular other the premises hereby released, or intended so to be, with their appurtenances, unto the said [*grantees*], and their heirs, TO THE USES, upon the trusts, and for the intents and purposes hereinafter declared or referred to concerning the same; that is to say, TO THE USE AND INTENT that the said [*grantees*], their heirs

INDEMNITY BY GRANT OF RENT CHARGE BY WAY OF USE.

Agreement for indemnity.

Testatum.

Habendum to grantees in fee.

To the intent that they may

INDEMNITY BY GRANT OF RENT CHARGE BY WAY OF USE.

Recital, a rent-charge of 20*l.*

and assigns, shall and may henceforth for ever hereafter yearly receive and take one annual sum, or yearly rent-charge of twenty pounds, of lawful money of Great Britain, to be chargeable upon, and yearly issuing out of the said messuage or tenement, and other hereditaments hereby released, or intended so to be, and to be paid half-yearly at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, by equal half-yearly payments, on the —— day of ——, and the —— day of ——, without any deduction or abatement whatsoever, on account of any taxes, charges, impositions, or assessments already imposed, or to be hereafter imposed on the said messuage or tenement, hereditaments, and premises, or on the said annual sum or yearly rent-charge of twenty pounds, or on the said [*grantees*], their heirs or assigns, in respect of the said hereditaments or rent, or either of them, by authority of Parliament or otherwise howsoever, or upon or in respect of any other matter, cause, or thing whatsoever; the first half-yearly payment of the said annual sum, or yearly rent-charge, to be made on the —— of ——, next ensuing: *Nevertheless*, upon and for the trusts, intents, and purposes hereinafter expressed concerning the same.

Upon the trusts after declared.

Powers of distress and entry.

AND TO AND FOR THIS FURTHER USE AND INTENT, (*Insert powers of distress and entry to the grantees, their heirs and assigns, ut ante*, Vol. I. p. 658, *varying only the words of limitation*). And as to the said messuage or tenement, hereditaments, and premises hereby released, or intended so to be, subject and charged with the payment of the said annual sum or yearly rent-charge, and the remedies hereinbefore reserved for the recovery thereof,

Lands subject to rent to the use of the grantors upon trust.

TO THE USE of the said [*grantors*], their heirs and assigns, upon the trusts, and for the intents and purposes, and under and subject to the powers, provisoes, and declarations, upon, under, and subject to which the same messuage or tenement, hereditaments, and premises were held by them the said [*grantors*] immediately before the execution of these presents, by virtue of the hereinbefore in part recited will of the said [*testator*].

Declaration of trusts as to rent.

AND IT IS HEREBY AGREED AND DECLARED, That the said [*grantees*], their heirs and assigns, shall stand seised of, and interested in, the said annual sum, or yearly rent-charge of twenty pounds herein-

before limited, as aforesaid, upon the trusts following, that is to say, UPON TRUST, and in order that the said annual sum, or yearly rent-charge of twenty pounds, shall henceforth save, defend, keep harmless and indemnified the said several messuages or tenements, hereditaments, and premises, with their appurtenances, so sold and conveyed to the said [*first purchaser*] and [*second purchaser*] respectively, as hereinbefore is mentioned; and also them the said [*first purchaser*] and [*second purchaser*], and each of them, their, and each of their appointees, heirs, executors, administrators, and assigns, and their, and each and every of their estates and effects whatsoever and wheresoever, from and against the said yearly rent of 4*l.* 10*s.* 6*d.*, and any other yearly rents to which the said messuages or tenements, hereditaments, and premises so sold and conveyed to the said [*first purchaser*] and [*second purchaser*] respectively, shall appear to be subject and liable; and all arrears and future payments thereof respectively; and all actions, suits, causes of action or suit, costs, damages, charges, and expenses whatsoever, for or in respect of the same, or any part thereof respectively, or in anywise relating thereto: *For which purpose* it is hereby agreed and declared between and by the parties to these presents, That if, at any time or times hereafter, any claim or demand whatsoever, in respect of the said yearly rent of 4*l.* 10*s.* 6*d.*, or any other yearly rents, or any of them, or any arrears or future payments thereof respectively, or any part or parts thereof respectively, shall be made upon the said several messuages or tenements, hereditaments, and premises so sold and conveyed to the said [*first purchaser*] and [*second purchaser*] respectively, as hereinbefore is mentioned, or any of them, or any part thereof respectively, or upon the said [*first purchaser*] and [*second purchaser*], or either of them, their, or either of their appointees, heirs, executors, administrators, or assigns, or the tenants or occupiers, tenant or occupier, for the time being, of the same messuages or tenements, hereditaments, and premises, or any of them; or any other person or persons who shall or may have or be entitled to any estate or interest of or in the same premises, or any part thereof, his, her, or their heirs, executors, or administrators; and the

INDEMNITY BY GRANT OF RENT CHARGE BY WAY OF USE.

Upon trust to indemnify purchasers.

In case of their being called upon to pay the rent originally charged.

INDEMNITY BY GRANT OF RENT CHARGE BY WAY OF USE.

said [*first purchaser*] and [*second purchaser*], or either of them, their or either of their appointees, heirs, executors, administrators, or assigns, or any such other person or persons as aforesaid, shall, by reason of any such claim or demand, or any act, deed, matter, or thing relating thereto, pay any sum or sums of money, or incur or sustain any costs, charges, damages, or expenses whatsoever, Then, and in such case, and so often as the same shall happen, the said [*grantees*], or the survivor of them, or the heirs or assigns of such survivor, shall and do, by and out of the said annual sum, or yearly rent-charge of twenty pounds, and any arrears thereof which shall be then due, levy and raise, and pay, discharge, and satisfy, unto the person or persons who shall have so paid such sum or sums of money, or incurred or sustained such costs, charges, damages, or expenses, as aforesaid, or his, her, or their executors or administrators, all the said sum or sums of money, costs, charges, damages, or expenses which shall have been so paid, or incurred, or sustained as aforesaid: And also do and shall, by and out of the same, levy and raise, and retain to themselves or himself, all their or his costs or expenses to be incurred in or about the execution of the aforesaid trusts.

Then in trust to raise and satisfy the same, and all expenses.

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Grantors to enjoy, subject to the trusts for indemnity.

PROVIDED ALWAYS, *and it is hereby agreed and declared*, That, subject and without prejudice to the trusts hereinbefore declared of the said annual sum, or yearly rent-charge of twenty pounds, the said [*grantees*], their heirs or assigns, shall and do permit the said messuage or tenement, and other hereditaments hereby released, or intended so to be, with their appurtenances, to be held and enjoyed, and the rents and profits thereof to be received and taken by the said [*grantors*], their heirs and assigns, in such manner as if the same messuage or tenement, hereditaments, and premises hereby released, or intended so to be, were not subject to, or were discharged from the said annual sum or yearly rent-charge of twenty pounds.

Proviso for *cesser* of the trusts.

PROVIDED ALSO, *and it is hereby further agreed and declared*, that, in case at any time hereafter the owner or owners of the said messuage or tenement, and other hereditaments hereby released, shall or do, at his, her, or their proper costs and charges, procure the said several messuages or

INDEMNITY BY GRANT OF RENT CHARGE BY WAY OF USE.

tenements, hereditaments and premises, so sold and conveyed to the said [*first purchaser*] and [*second purchaser*] respectively, as hereinbefore mentioned to be effectually released from the said yearly rent of 4*l.* 10*s.* 6*d.*, and all arrears thereof, and if it shall at any time hereafter be ascertained that no other yearly rent or rents is or are charged or chargeable upon the same messuages or tenements, hereditaments, and premises, or any of them, Or in case, by any other means, *the said yearly [*270] rent of 4*l.* 10*s.* 6*d.*, and all other yearly rents, if any, which are now charged thereon, shall cease to be payable out of, or charged or chargeable upon the same messuages or tenements, hereditaments, and premises, or any of them, and all monies, if any, which shall then have become raisable under the trusts aforesaid, shall be fully paid and discharged, Or in case the trusts hereinbefore declared concerning the said annual sum or yearly rent-charge of twenty pounds, shall otherwise be fully satisfied, or become unnecessary, or incapable of taking effect, Then, and in such case, and immediately thereupon, the said annual sum or yearly rent-charge of twenty pounds, and the said powers and remedies for enforcing the payment thereof, shall cease and determine, any thing hereinbefore contained to the contrary notwithstanding. *(Covenant by each of the grantors, so far only as relates to his own acts and deeds, that he has not incumbered).* And the said [*cestui que trust*] doth hereby for himself, his heirs, executors and administrators, covenant and agree with the said [*grantees*], their heirs and assigns, in manner following, that is to say, that notwithstanding any act, deed, matter, or thing whatsoever, by him the said [*cestui que trust*], or by the said [*testator*], the testator, made, done, or executed, or knowingly suffered to the contrary, they the said [*grantor*] and [*cestui que trust*], or some or one of them, now have or hath in themselves or himself, good right, full power, and absolute authority to release and assure the said messuage, and other hereditaments hereby released, or intended so to be, with the appurtenances, to the uses, and in manner aforesaid, and according to the true intent of these presents; and that it shall be lawful for the said [*grantees*], their heirs, and assigns, from time to time, and

Covenants for title by *cestui que trust.*

INDEMNITY BY GRANT OF RENT CHARGE BY WAY OF USE.

at all times hereafter, peaceably and quietly to hold, receive, and enjoy the said annual sum or yearly rent-charge of twenty pounds, and the said powers and remedies for enforcing the payment thereof, without the lawful let, suit, trouble, interruption, claim, or demand whatsoever, of or by him the said [*cestui que trust*], or his heirs, or of or by any other person or persons lawfully or equitably claiming or to claim, by, from, or under, or in trust for him, them, or any of them, or by, from, or under the said [*testator*], the testator; And that free and clear,

[*271] *and freely, clearly, and absolutely acquitted, released, and for ever discharged, or otherwise by the said [*cestui que trust*], his heirs, executors, or administrators, well and sufficiently saved and kept harmless and indemnified from and against all and all manner of former and other estates, titles, charges and incumbrances whatsoever, either already executed, occasioned, or suffered, or hereafter to be executed, occasioned, or suffered by him the said [*cestui que trust*], or his heirs, or the said [*testator*], or by any person or persons lawfully or equitably claiming, or to claim, by, from, or under, or in trust for them or any of them; *And further* that he the said [*cestui que trust*], and his heirs, and every other person having or lawfully claiming, or who shall or may have or lawfully claim any estate, right, title, interest, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said messuage and other hereditaments hereby released, or intended so to be, or any of them, or any part thereof, by, from, or under, or in trust for him the said [*cestui que trust*], or his heirs, or by, from, or under the said [*testator*], will, from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by, and at the proper costs and charges in the law of the said [*grantees*], their heirs or assigns, make, do, acknowledge, levy, suffer, and execute, or procure to be made, done, acknowledged, levied, suffered, and executed, all and every such further and other lawful acts, deeds, and assurances in the law whatsoever, for the more effectually limiting and assuring of the said annual sum or yearly rent-charge of twenty pounds, with the said powers and remedies for enforcing the payment thereof unto the said [*grantees*], their heirs

INDEMNITY BY GRANT OF RENT CHARGE BY WAY OF USE.

Power of appointing new trustees, with special provision as to the mode of supplying the respective vacancies.

and assigns, as by the said [*grantees*], their heirs or assigns, or their counsel in the law, shall be reasonably devised or advised and required. PROVIDED ALWAYS, *and it is hereby agreed and declared*, that if the said trustees in and by these presents appointed, or either of them, or any future trustee or trustees to be appointed as hereinafter is mentioned, shall happen to die, or be desirous to be discharged from, or refuse, or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, performed, or discharged; Then and in every such case, and so often as the same shall happen, if *the trustee or trustees so dying, or desiring to be discharged, or refusing or becoming incapable to act as aforesaid, shall be the said [*first-named trustee*], or his heirs, or any future trustee or trustees to be appointed in his or their stead, as hereinafter is mentioned, it shall be lawful for the said [*first purchaser*], his appointees, heirs, or assigns (*a*), by any deed or deeds, instrument or instruments in writing, to be sealed or delivered by him or them, in the presence of and attested by two or more credible witnesses, from time to time to substitute or appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or desiring to be discharged, or refusing, or becoming incapable to act as last hereinbefore is mentioned, And if the trustee or trustees so dying or desiring to be discharged, or refusing, or becoming incapable to act as aforesaid, shall be the said [*second trustee*], or his heirs, or any future trustee or trustees to be appointed in his or their stead, as hereinafter is mentioned, it shall be lawful for the said [*second purchaser*], his appointees, heirs, or assigns, by any such deed or deeds, instrument or instruments as aforesaid, from time to time to substitute or appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or desiring to be discharged, or refusing, or becoming incapable to act, as lastly hereinbefore mentioned,

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(*a*) The object of this provision, it will be obvious, is so to regulate the appointment of new trustees, as to secure to each of the two purchasers one nominee in the trust.

INDEMNITY BY GRANT OF RENT CHARGE BY WAY OF USE.

And that upon any such appointment, the said annual sum or yearly rent-charge of twenty pounds, shall be conveyed in such manner that the same may be effectually vested in the new trustee or trustees jointly with the surviving or continuing trustee or trustees, or solely, as the case may require, Upon the trusts hereinbefore declared concerning the same, or such of them as shall be then subsisting; And that every such new trustee or trustees shall have the same powers and authorities, and discretion, to all intents and purposes whatsoever, as if he or they had been originally nominated a trustee or trustees herein. *(Usual indemnity to trustees).* IN WITNESS, &c.

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GRANT OF POWER OF DISTRESS BY WAY OF INDEMNITY.

DEED *of* COVENANT *by one* PURCHASER *with other Purchasers, and the Vendors,* CHARGING, *exclusively, Lands sold to him with certain* ANNUAL OUTGOINGS *payable out of the whole, and giving a* POWER *of* DISTRESS *by way of Indemnity.*

Parties.

THIS INDENTURE, &c., BETWEEN [*covenantor*], of the first part; [*purchasers of certain parts of the premises intended to be exonerated*], of the second part; [*vendors, being owners of other parts*], of the third part: WHEREAS

Recital of sale of certain hereditaments in divers lots.

divers freehold estates, situate in the parishes of ——, in the county of ——, late the property of [A. B.], esquire, deceased, and to which the said [*vendors*] became entitled in fee-simple, under the will of the said [*testator*], were some time since offered for sale by public auction in fifty-nine lots (*a*); and the said [*covenantor*] thereupon contracted

(*a*) In this case, a reference to the lots into which the property was distributed, at the sale by auction, seems to be almost unavoidable, in order to explain the transaction, and more conveniently to distinguish the several purchases; but, in general, references of this nature, which introduce the temporary arrangements of the sale into the recitals of the conveyance, are not desirable.

for the purchase of lots two, three, and forty-seven, consisting of the lands and hereditaments specified and set forth in Schedule A. hereunto annexed; *And* the said several persons parties hereto of the second part also contracted for the purchase of the rest of the said lots (excepts lots eight and twenty-seven) which lots, so contracted to be purchased by the said parties of the second part, consist of the lands and hereditaments specified and set forth in Schedule B. hereunto annexed: AND WHEREAS the said lots eight and twenty-seven, being the residue of the said estates, and consisting of the lands and hereditaments specified and set forth in Schedule C. hereunto annexed, remain in the hands of the said [*vendor*] unsold: AND WHEREAS, upon entering into the said several contracts, it was stated to *the said several purchasers, that lot two was to be sold subject to an annual payment of 32*l.* to the minister of [D.], and to the repair of the chancel of [D.] church; *And* that lot three was subject to the following annual outgoings, namely, a rent of 3*l.* 9*s.* 6*d.*, formerly payable to the Crown, but now payable to [T. L.], esquire, and 10*l.* for the salary of the master of [D.] school: AND it was thereupon agreed, that the purchaser or purchasers of the said lots two and three, should execute a deed, covenanting that the aforesaid annual payment of 32*l.*, and the expense of repairing the chancel of [D.] church, should for ever be charged exclusively on the said lot two; *And* that the said other annual outgoings, amounting together to the sum of 13*l.* 9*s.* 6*d.*, should for ever be charged exclusively on the said lot three; *And* that power should be given to the purchasers of the other lots, their heirs and assigns, to enter and distrain on the said lots two and three, for their indemnity against such outgoings. AND WHEREAS by or by virtue of the several indentures of lease and release mentioned or specified in the said Schedules A. and B., and under or by virtue of the several assurances in the same indentures of release recited or mentioned, the said several lots so contracted to be purchased by the said several parties hereto of the first and second parts, as aforesaid, have been, or are intended to be conveyed unto, or according to the appointment of, or in trust for, the

GRANT OF POWER OF DISTRESS BY WAY OF INDEMNITY.

Certain lots sold subject to the charges,

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And to a stipulation for the indemnity of the other purchasers.

Reference to the conveyances to the several purchasers.

GRANT OF POWER OF DISTRESS BY WAY OF INDEMNITY.

Testatum.

same parties respectively, or their respective appointees, heirs, or assigns, in manner therein expressed. NOW THIS INDENTURE WITNESSETH, that, for carrying into effect the agreement so entered into as aforesaid in this behalf, and in consideration of the premises,

Covenant—

the said [*covenantor*] *doth* for himself, his appointees, heirs, executors, administrators, and assigns, grant, covenant, promise, and agree, to and with the said several other persons, parties hereto of the second and third parts, and their respective appointees, heirs, and assigns, by these presents in manner following; (that is to say), that

that the rents shall be charged only upon the covenantor's lots.

the said annual payment of *32l.* to the minister of [D.], and the expense of repairing the chancel of [D.] church, shall for ever be charged exclusively on the hereditaments comprised in lot two aforesaid; and that the said other annual outgoings shall for ever be exclusively charged on the hereditaments comprised in lot three aforesaid. AND

Power of distress by way of indemnity.

*FURTHER (*a*), that if, at any time or times hereafter, any

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(*a*) The validity of these indemnifying powers of distress, and that they enure for the benefit of the owner for the time being of the lands to be exonerated, seem to have been established at an early period.

Powers of distress by way of indemnity valid, and run with the land.

Thus, in an Anonymous case in Moore, p. 179, pl. 318, it is said that Serjeant Fleetwood moved, in the Common Pleas, that a man made a feoffment in fee reserving rent, and granted that if the feoffee, his heirs or assigns, were distrained upon for more services than were reserved by the deed, then it should be lawful for the feoffee, his heirs or assigns, to distrain in the manor of D., and hold the distress until he should be satisfied the damage he had sustained by reason of the said distress. The feoffee made feoffment over, and if the second feoffee could distrain was the question; and the Court said, that he might, for the covenant ran with the lands; and *per Perryam*, J.—If the word *assigns* were not there, yet the word *heirs* would give a right of distress to the assignee.

So, in *Allerton* v. *Eden*, Noy's Rep. 5; *S. C. nom. Eden* v. *Atterton*, And. 126, pl. 72, where the Bishop of Norwich, being seised of three manors, and of a rectory, granted the rectory to N., his heirs and assigns; and because the Queen had a rent, &c. of thirty-three pounds out of the rectory, he covenanted and granted with and to N., his heirs and assigns, that if, &c. he should be distrained, &c. for that rent, &c., then it should be lawful for N., his heirs and assigns, to distrain for so much in the three manors. The three manors were afterwards granted to W., and N. also granted the rectory, with such clause of distress in the same manors to B.;

GRANT OF POWER OF DISTRESS BY WAY OF INDEMNITY.

distress or distresses shall be made or levied in or upon any part or parts of the lands and hereditaments comprised in the said Schedules B. and C., hereinbefore referred to, for recovering payment of the said annual sum of *32l.*, or of any money for such repair as aforesaid; or for recovering payment of the said other annual outgoings, or of any *part thereof respectively; or if any money or costs [*276] shall be recovered against any of the owners or occupiers of the hereditaments comprised in the said Schedules B. and C., on account of the said annual rent of *32l.*, or repairs, or any other of the said outgoings, then and in every such case, so often as the same shall happen, it shall be lawful for the person or persons for the time being entitled in possession to the hereditaments, wherein or whereupon any such distress or distresses shall be so made or levied as aforesaid, or for such owners or occupiers as aforesaid, against whom such money or costs shall be recovered as aforesaid, to enter and distrain upon the hereditaments intended to be hereby exclusively charged with the annual outgoing or annual outgoings for which such distress or distresses shall have been so made or levied as aforesaid, or such money or costs as shall have been recovered as aforesaid; And the distress or distresses then and there made, under the authority of these presents, to take, lead, drive, carry away, impound, and in pound to detain and keep, and in due time afterwards to sell or dispose of, or otherwise to act therein according to law, in the same manner as in the case of distresses by landlords for rent reserv-

Power of distress.

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and it was held that N. might lawfully grant that over, and a distress by B. was adjudged lawful.

Though these powers of distress, therefore, have been much disused in modern practice, (*vide ante*, p. 251), yet their efficiency for the purposes of indemnity is beyond all doubt; and where the transaction is small, and the number of purchasers few, so that a separate power of distrees can conveniently be introduced into the conveyance of each, instead of limiting a rent to trustees for the benefit of all, and especially if the charge, against which protection is sought to be obtained, be determinable on death or any other proximate event, (*ut post*, p. 280), a simple power of distress seems to be the most eligible mode of effecting the intention of the parties.

GRANT OF POWER OF DISTRESS BY WAY OF INDEMNITY.

ed upon leases for years; *To the end and intent*, that, by the ways and means aforesaid, the person or persons so for the time being entitled as aforesaid, or against whom any such money or costs shall be recovered as aforesaid, may be fully paid and satisfied all and singular the sum and sums of money, costs, charges, damages, and expenses, which he or they shall or may have sustained, incurred, or have been put unto, by reason or in consequence of any such distress or distresses, or any action or actions, suit or suits, for recovering payment of any of the said annual outgoings as aforesaid, or otherwise in relation thereto; And also the costs, charges, and expenses incident to or attending the distress or distresses to be made or levied in pursuance of the power hereinbefore contained, or in relation thereto. IN WITNESS, &c.

THE SCHEDULES to which the preceding indenture refers.

SCHEDULE A.

Name of Close.	Contents.	Parish where situate.	Occupying Tenant.

(Other Schedules in the same manner).

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GRANT OF POWER OF DISTRESS BY WAY OF INDEMNITY.

INDEMNITY *against a* RENT-CHARGE, *by a* GRANT *of a* POWER *of* DISTRESS *on* OTHER *Lands, and* ASSIGNMENT *of a* BOND *of* INDEMNITY.

Parties.

THIS INDENTURE, &c. BETWEEN [*grantor*], of &c., of the first part; [*mesne purchaser*], of &c., of the second part; [*grantee*], of &c., of the third part.

Recitals—

WHEREAS, by in-

dentures of lease and release, bearing date respectively the —— and —— days of ——, and respectively made between the said [*grantor*] of the one part, and the said [*mesne purchaser*] of the other part, in consideration of the sum of —— to the said [*grantor*] paid by the said [*mesne purchaser*]: *All that* [*describe parcels*] being part and parcel of a certain farm, lands, and hereditaments, called G. C., situate &c., were conveyed and assured (*a*) by the said [*grantor*] unto and to the use of the said [*mesne purchaser*], his heirs and assigns, for ever. And whereas the whole of the said farm, lands, and hereditaments, called G. C., is subject to and charged with the payment of an annuity or yearly rent-charge of five pounds, payable to the poor of the parish of —— aforesaid: And by a bond, under the hand and seal of the said [*grantor*], dated &c., the said [*grantor*] became bound to the said [*mesne purchaser*] in the penal sum of two hundred pounds, with a condition thereunder written, which, after reciting the said recited indentures of lease and release, and that it was agreed that the said annuity or yearly rent-charge of five pounds should remain charged upon that part of the messuage, lands, and farm, called G. C., which was not agreed to be sold and *conveyed to the said [*mesne purchaser*], Did declare that if the said [*grantor*], his heirs, executors, and administrators, should at all times thereafter defend, keep harmless, and indemnify the said [*mesne purchaser*], his heirs and assigns, and also the said lands and premises so purchased by the said [*mesne purchaser*] as aforesaid, of and from the payment of the said annuity or yearly rent-charge of five pounds, and all costs, charges, damages, and expenses, by reason or on account thereof, then the said bond should be void. And whereas the said [*grantee*] hath lately purchased of and from the said [*mesne purchaser*], the said pieces or parcels of lands and hereditaments, comprised in the said recited indentures of lease and release of the —— and —— days of ——, and

GRANT OF POWER OF DISTRESS BY WAY OF INDEMNITY.

—That said premises, with others, were subject to a rent-charge.

—of bond of indemnity.

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Purchase by grantee of the mesne purchaser and conveyance.

(*a*) Where it is intended that the recital shall describe, as here, the conjoint effect of the lease and release, it is inaccurate (as is often done) to follow the operative words of the release, since those words apply to that *part* of the assurance only.

GRANT OF POWER OF DISTRESS BY WAY OF INDEMNITY.

the inheritance thereof in fee-simple, free from all incumbrances, at or for the price or sum of ——; and in consideration thereof, by indentures of lease and release, bearing date respectively, the lease the day before, and the release even date with, but executed before the sealing and delivery of, these presents, and made between the said [*mesne purchaser*] of the first part, the said [*grantee*] of the second part, and [*trustee*] of the third part, the same pieces or parcels of land and hereditaments are conveyed and assured unto and to the use of the said [*grantee*], his appointees, heirs, and assigns, in manner in the said indenture of release mentioned. AND WHEREAS, upon the treaty for the purchase so made by the said [*grantee*] as aforesaid, it was agreed between the said parties hereto, that the said [*grantee*], his appointees, heirs, and assigns, should have such power of entry and distress upon so much and such part of the said messuage, lands, and farm, called G. C., as are not comprised in the said firstly recited indentures of lease and release, as hereinafter mentioned, by way of a further indemnity to him and them against the payment of the said annuity or yearly rent-charge of five pounds. NOW THIS INDENTURE WITNESSETH, that, for carrying into effect the agreement so entered into as aforesaid, and in consideration of the premises, the said [*grantor*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said [*grantee*], his appointees, heirs, and assigns, in manner following, that is *to say, that the said annuity or yearly rent-charge of five pounds shall henceforth for ever hereafter be exclusively charged upon and issuing out of the farm and hereditaments mentioned in the schedule hereunder written, being so much of the said messuage, lands, and farm, called G. C., as is not comprised in the said firstly recited indentures of lease and release; AND FURTHER, that, if at any time or times hereafter, any distress or distresses shall be made or levied in or upon any part or parts of the said lands and hereditaments comprised in the said firstly recited indentures of lease and release, and the said lastly recited indentures of lease and release, such release bearing even date herewith as aforesaid, for recovering pay-

Agreement that grantee should have power of entry and distress on the other part of said premises by way of further indemnity.

Testatum.

Consideration.

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Covenant that annuity shall be exclusively charged on other premises.

ment of the said annuity or yearly rent-charge of five pounds, or any part thereof, Then and in every such case, it shall be lawful for the said [*grantee*], his heirs, appointees, and assigns, to enter and distrain upon the hereditaments mentioned in the schedule hereunder written, or any part thereof; And the distress and distresses then and there made, under the authority of these presents, to take, lead, drive, carry away, and impound, and the same to detain and keep, and in due time afterwards to sell and dispose of, or otherwise to act therein according to law, in the same manner as in cases of distress by landlords for rent reserved upon leases for years; *To the intent* that, by the ways and means aforesaid, the said [*grantee*], his heirs, appointees, and assigns, may be fully paid and satisfied all and singular sum and sums of money, costs, charges, damages, and expenses, which he or they shall or may have incurred, sustained, or been put unto, by reason or in consequence of such distress or distresses, or any action or actions, suit or suits, for recovering payment of the said annuity or yearly rent-charge of five pounds, or otherwise in relation thereto; and also the costs, charges, and expenses incident to or attending the said distress or distresses so to be made and levied as aforesaid. AND THIS INDENTURE FURTHER WITNESSETH, that, in consideration of the premises, the said [*mesne purchaser*] *hath* bargained, sold, and assigned, and by these presents *doth* bargain, &c., unto the said [*grantee*], his executors, administrators, and assigns, the said recited *bond, dated &c., and the full benefit and advantage thereof, and all sums of money recoverable, and to be had, received, and taken upon or by virtue of the same: *And* all the right, interest, property, claim, and demand of the said [*mesne purchaser*], in, to, and out of the same, together with all powers, remedies, and means, either in the name of the said [*mesne purchaser*], his executors or administrators, or otherwise, requisite or necessary for the suing upon and enforcing the said recited bond, and the performance of the condition thereof, TO HAVE, HOLD, receive, and take the said bond and premises, expressed to be hereby assigned unto and by the said [*grantee*], his executors, administrators, and assigns, for his and their own use and benefit absolutely. IN WITNESS, &c.

GRANT OF POWER OF DISTRESS BY WAY OF INDEMNITY.

Power of distress.

Further *testatum*.

Assignment of bond of indemnity.

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Premises.

Habendum.

COVENANT TO PAY RENT-CHARGE, AND POWER OF DISTRESS BY WAY OF INDEMNITY.

A. *and* B. *having respectively* PURCHASED *two* MESSUAGES, *subject to a* LIFE-ANNUITY, *which was, by the Stipulations of the Contract, to be equally apportioned between them, the following* COVENANT *to* PAY, *&c., and* POWERS *of* DISTRESS, *by way of* INDEMNITY, *were introduced into their respective Conveyances.*

(THE *indentures were respectively made between* [vendor] *of the first part;* [vendor's trustee], *of the second part;* [covenantor-purchaser, *i. e.* the purchaser of the other messuage subject to the charge], *of the third part;* [covenantee-purchaser, *i. e.* the present vendee] *of the fourth part; and* [vendee's trustee], *of the fifth part; and they recited the indentures of lease and release creating the rent-charge for the life of P., with powers of distress and entry, and trusts for sale of a term of years limited for securing the same, and the contract for the purchase of the messuage about to be conveyed. By the* testatum *clause, the vendor and his trustee then released such messuage to the vendee, to uses to prevent dower; and the following clauses were added to effect the proposed indemnity:)*—AND WHEREAS the said [*covenantor-purchaser*] has purchased from the said [*vendor*] the other of the said two messuages or dwelling-houses, charged with the payment of the said annuity or rent-charge of 50*l.* AND WHEREAS it has been agreed between the said [*covenantee-purchaser*] and [*covenantor-purchaser*], that one moiety or half part of the said annuity or rent-charge of 50*l.*, so payable to the said [*annuitant*] as aforesaid, shall be paid by the said [*covenantor-purchaser*], his heirs, appointees, executors, administrators, or assigns; and that the other moiety of such annuity or rent-charge shall be paid by the said [*covenantee-purchaser*], his heirs, appointees, executors, administrators, or assigns. AND WHEREAS, by in-

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Recital of agreement to apportion charge.

Conveyance of

dentures of lease and release, the lease bearing date the day next before the day of the date of the release, and the release bearing even date with these presents, and made between the said [*vendor's trustee*], of the first part; the said [*vendor*], of the second part; the said [*covenantor-purchaser*], of the third part; and [*trustee to prevent dower*], of the fourth part; for the considerations therein mentioned, the said [*vendor's trustee*], and the said [*vendor*] did respectively convey and assure unto the said [*covenantor*], his heirs and assigns, a capital messuage or tenement, with the yards, gardens, stables, and other appurtenances, situate in —— street, in the town of ——, aforesaid, in the occupation of the said ——, (being the other of the said messuages or dwelling-houses, which were charged with the said annuity or yearly rent-charge, as aforesaid); *To hold* the same unto or in trust for the said [*covenantor-purchaser*], his heirs, appointees, and assigns, in manner in the said indenture of release expressed. And in the same indenture is contained a covenant or agreement on the part of the said [*covenantee-purchaser*], his heirs, appointees, executors, administrators, and assigns, of the same effect with the covenant or agreement next hereinafter contained on the part of the said [*covenantor-purchaser*]. NOW THIS INDENTURE FURTHER WITNESSETH, that, in pursuance of the said agreement so entered into as aforesaid between the said [*covenantor-purchaser*] and [*covenantee-purchaser*] relative to the apportionment of the said annuity or rent-charge of *50*l.*, so payable to the said [*annuitant*] as aforesaid; and in consideration of the said covenant or agreement, entered into by the said [*covenantee-purchaser*] with the said [*covenantor-purchaser*], in the said last above recited indenture of release, He the said [*covenantor-purchaser*], for himself, his heirs, appointees, executors, administrators, and assigns, doth covenant, promise, and agree to and with the said [*covenantee-purchaser*], his heirs, appointees, executors, administrators, and assigns, by these presents, in manner following; (that is to say), that he the said [*covenantor-purchaser*], his heirs, appointees, executors, administrators, or assigns, some or one of them, shall and will well and truly pay or cause to be paid to the said [*an-*

COVENANT TO PAY RENT-CHARGE, AND POWER OF DISTRESS BY WAY OF INDEMNITY.

other messuage to covenantor.

Testatum.

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Covenant by purchaser of the other messuage with the present vendee to pay one moiety of the charge;

COVENANT TO PAY RENT-CHARGE, AND POWER OF DISTRESS BY WAY OF INDEMNITY.

nuitant] or his assigns, one moiety or equal half part of the said annuity or yearly rent-charge of 50*l.*, granted and secured by the said hereinbefore recited indentures of lease and release, of the —— and —— days of ——, as aforesaid, at the times and in manner mentioned and appointed for payment thereof in and by the same last-mentioned indenture, without any deduction or abatement whatsoever; *And also* one moiety or equal half part of such proportional part of the said annuity or yearly rent-charge, as shall be payable up to the day of the decease of the said [*annuitant*], and that without any deduction or abatement whatsoever: *And also* (*a*), that he the said [*cove-*

And of the proportional part which may become due:

And to indemnify the vendee, his heirs, &c., therefrom.

(*a*) In a late case it was contended, that a covenant to indemnify, associated in this manner with a covenant to pay, qualified and restricted the latter covenant, so that no action could be maintained on it for default of payment, unless the covenantee had been damnified by the actual payment of the money: but the Court decided that the covenants were independent, and that an action would lie for breach of the covenant to pay, although the covenantee had not himself paid the money. *Saward* v. *Anstey*, 10 J. B. Moore, 55. This point may be very important where there is any doubt as to the covenantee's liability to the charges agreed to be paid by the other party; for, according to the construction just mentioned, the proof of his non-liability would be no defence to the action on the covenant to pay; and it will be obvious, that there are cases in which a person may be anxious to obtain an obligation from a third person to the payment of a charge for which he is not himself personally responsible. *Saward* v. *Anstey* was a case of this nature, where A., to whom certain lands had been devised, subject to certain annuities to his sisters, sold the lands, and procured the purchaser to enter into a covenant with him for the payment of the annuities, and to indemnify him therefrom. As these annuities affected the lands merely, and did not charge the devisee personally, the covenant for his personal indemnification was inoperative; and if, therefore, this covenant had been held to restrain the other, the whole would have been nugatory; and this consideration certainly seems to have weighed with the Court.

Whether covenant to indemnify qualifies the covenant to pay.

The case suggests, that, in preparing covenants of this kind, care should be taken distinctly to shew (if such be the intention) that they are meant to be independent; and, to avoid the possibility of a contrary construction, it may sometimes even be advisable to repeat the names of the parties, and the operative words of covenant.

Whether a co-

Where the grant of a rent-charge, whether for the purpose of indemnity

nantor-purchaser], his heirs, appointees, executors, administrators, or assigns, some or one of them, shall and will,

COVENANT TO PAY RENT-CHARGE, AND POWER OF DISTRESS BY WAY OF INDEMNITY.

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or otherwise, is accompanied by a covenant from the owner of the land for payment of it, the value of such covenant, of course, depends much upon the fact whether it runs with the land and with the rent; or, in other words, whether the owner of the land for the time being is liable to an action upon the covenant, at the suit of the owner of the rent for the time being. These are distinct points. In regard to the former, the case of *Roach* v. *Wadham*, 6 East, 289, has been considered as establishing, that where a person, who has a power of appointment over lands, with or without an estate in default of appointment, grants a rent, covenanting to pay such rent, and then exercises his power, his appointee is not bound by the covenant, *there being no privity between the covenantee and appointee, as the latter, according to a well-known doctrine, is* IN *immediately under the deed creating the power.*

Covenant to pay rent runs with the land.

Appointee not bound.

The case of *Roach* v. *Wadham* was shortly this:—By indentures of lease and release, dated the 23d and 24th of June, 1791, the plaintiffs conveyed an undivided part of a certain messuage unto T. Coates and his heirs, to such uses as W. Watts should by deed or will appoint; and, in default of appointment, to the use of W. Watts, his heirs and assigns, for ever, yielding and paying, and the said W. Watts, and by his direction the said T. Coates, granted unto the plaintiffs, their heirs and assigns, for ever, the yearly fee-farm rent of 28*l.*, payable, &c. And W. Watts for himself, his heirs and assigns, covenanted and granted with the plaintiffs, their heirs and assigns, (amongst other things), that he, Watts, his heirs and assigns, would pay, or cause to be paid, to the plaintiffs, their heirs and assigns, the said yearly rent of 28*l.* on the days &c., aforesaid.

Roach v. *Wadham.*

By indentures of the 25th and 26th of September, 1792, in consideration of 1000*l.* paid to and by the direction of W. Watts, by Wadham and Stevens, the said Coates, by the direction of W. Watts, did, according to his estate and interest, bargain, sell, and release, and the said W. Watts did bargain, sell, alien, release, ratify, and confirm, *and also direct, limit, and appoint* unto the said Wadham and Stevens, and one Powell, and to their heirs, the said hereditaments; to hold the same unto and to the use of them, and the heirs and assigns of said Wadham and Stevens, for ever, as tenants in common†, in trust as to the estate of Powell for Wadham and

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† The deed abounds in inaccuracies:—Coates, who is made to join in granting the rent by the first conveyance, and a conveying party in the second, had no interest, being merely a releasee to uses; and the object of vesting an estate in Powell, which no doubt was to prevent the wives of

COVENANT TO PAY RENT-CHARGE, AND POWER OF DISTRESS BY WAY OF INDEMNITY.

from time to time, and at all times hereafter, save, defend, keep harmless and indemnified, the said [*covenantee-*

Stevens, their heirs and assigns, as tenants in common, subject to the rent reserved by the last-mentioned indenture. And Wadham and Stevens, respectively, covenanted with Watts, his heirs and assigns, to pay such rent in equal moieties, and to perform the covenants contained in the said indenture, and to indemnify Watts, his heirs and assigns, therefrom. Wadham died, and the present action was brought against his devisee and executor by the covenantees, (parties to the indenture of 1791), to recover a moiety of the rent. Against the plaintiff's claim it was contended, that inasmuch as the conveyance to the testator operated as an appointment, by virtue of the power reserved to Watts, and not a release out of his ownership, there was no privity of estate between Wadham, the testator, and Watts, the covenantor, and consequently Wadham was not bound; and this was not denied on the other side, the great contest being, whether the deed operated as an appointment or release†; and the Court being of opinion that the deed took effect under the power, it was considered as consequential on this decision that the action could not be maintained.

Remarks upon *Roach* v. *Wadham.*

The inference deducible from this case is, that if the grantor of the rent had conveyed the land by virtue of his ownership, instead of exercising his power, such grantee would have been bound by the covenant; a doctrine which, though encountered by a *dictum* of Lord *Holt*, (see *Brewster* v. *Kitchell*, Salk. 198; 1 Ld. Raym. 322; 5 Mod. 369, *S. C.*), certainly accords with the generally received opinion of the profession on the subject.

Whether covenant to pay runs with the rent.

As to the other point suggested, namely, whether the owner for the time being of a fee-farm rent can maintain an action on a covenant for payment of it, the late case of *Milnes* v. *Branch*, 5 M. & S. 411, may afford some

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the purchasers from being dowable, was defeated by the mode of the limitation, the uses being limited to the three as tenants in common, instead of one moiety to each purchaser and his trustee as joint-tenants, which would, during the continuance of their joint seisin at least, have excluded dower. This clumsy and inefficient mode of excluding dower has deservedly become obsolete. It was liable to the obvious objection, that, if the purchaser survived his companion, the trustee during the coverture, he became solely seised, and the dower attached; if the trustee survived, the legal estate vested solely in him, which was also inconvenient.

† On this, see now *Wynne* v. *Griffith*, 5 Barn. & Cress. 923; *S. C.* 8 Dowl. & R. 820; 3 Bing. 179.

purchaser], his heirs, appointees, and assigns; and also the owner and owners, occupier and occupiers for the

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important matter for consideration. In this case, lands stood limited, as to one moiety, to such uses as A. should appoint, and, in default of appointment, to him in fee; and, as to the other moiety, to the use of A. and B., (B. being a trustee for A.), and the heirs and assigns of A. A., by indenture, appointed the first moiety to C., a purchaser, and D., his trustee, their heirs and assigns, for ever†; and A. and B. conveyed the second moiety to C. and D., and their heirs, to the use and intent that A. and B., their heirs and assigns, might receive and take to the use of A. and B., and the heirs and assigns of A., (as to the estate of B. in trust for A., his heirs and assigns), the yearly rent of 86*l.* 3*s.* 3*d.*, to be issuing out of the lands by equal half-yearly payments, with powers of distress and entry, and, subject thereto, to the use of C. and D., and the heirs and assigns of C. for ever, nevertheless, as to the estate of D. in trust for C. and his heirs and assigns. And C. did for himself, his heirs, executors, and administrators, covenant with A. and B., and the heirs and assigns of A., that he, his heirs and assigns, would pay to A. and B., and the heirs and assigns of A., the said yearly rent; and also, that he, his heirs or assigns, would erect a certain messuage, and, in case of destruction, rebuild the same for the better security of the yearly rent thereby reserved. A. and B. subsequently demised the rent of 86*l.* 3*s.* 3*d.* to the plaintiffs, their executors, administrators, and assigns, for one thousand years. These lessees brought an action on the covenant against C., the covenantor, to which he demurred, on the ground that the covenant did not run with the rent; and therefore the action was not maintainable by the plaintiffs. Against this doctrine was urged a *dictum* of Lord *Holt*, 12 Mod. 170, that "the assignee of a rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted." But the Court in the principal case held that the action did not lie.

Lord *Ellenborough*, C. J.—"I am inclined to think, that the language

† By this inaccurate mode of limitation, it is clear, that the use was executed in C. and D., contrary to the intention of the parties; and the limitations over, including the rent, in respect of this moiety, conferred equitable interests only. No error more frequently strikes the eye of the conveyancing practitioner in the perusal of titles, than that of parties unintentionally vesting the legal estate in an improper person, by attempting to exercise an appointment under a power, or convey by bargain and sale to one person to the use of another, instead of limiting the lands immediately to the intended *cestui que use*.

COVENANT TO PAY RENT-CHARGE, AND POWER OF DISTRESS BY WAY OF INDEMNITY.

time being, of the said messuage or dwelling-house and premises hereby released, or intended so to be, and of

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of Lord *Holt*, as to the right of the assignee of the rent to have covenant, was extra-judicial; and, putting aside that *dictum*, I do not find any authority to warrant the position that this covenant runs with the rent. I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shewn that this is land. It might as well be applied to any covenant respecting a matter merely personal. The stat. Hen. 8 recites, that, at common law, such only as are parties or privies to any covenant can take advantage of it. Here is neither privity of contract, nor privity of estate. The rent is reserved out of the original estate."

Bayley, J.—"I am entirely of the same opinion. The argument for the plaintiffs loses sight of the conveyance by which this rent is created. It is incorrect to state it as a rent-charge granted by the owner of the fee, it being a conveyance in fee by A. and B. to the defendant, to certain uses; one of which is, that he shall receive the rent, so that the rent arises out of the estate of the feoffors. It is, therefore, not a grant by the owner of the fee, and the covenant is a covenant in gross."

Abbott, J., concurred.

Remarks upon the case of *Milnes* v. *Branch*.

Though some of Lord *Ellenborough's* observations may seem to imply a doubt, whether the grantee of the rent could in any case maintain an action for it, yet the decision can hardly be taken as an authority to this extent. A rent is an incorporeal hereditament, and there seems to be no reason why a covenant should not run with it, as well as with any other species of real estate. The affirmative, indeed, has been expressly decided as to tithes, on the construction of the stat. 32 Hen. 8, c. 34, (stated *post*), on the ground that there was no distinction between land and incorporeal hereditaments, in regard to the annexation of covenants; *Bally* v. *Wells*, 3 Wils. 25; *S. C.* Wilm. Cas. & Op. 341; and it was assumed in the late case of the Earl of *Portmore* v. *Bunn*, (1 Barn. & Cress. 694; *S. C.* 3 Dowl. & Ry. 145), that a covenant would run with any incorporeal hereditament. A contrary doctrine would render covenants for title in grants of advowsons, tithes, and other incorporeal hereditaments, merely covenants in gross.

The case of *Milnes* v. *Branch* is open to some observation: the covenant was not so limited as ro run in the same channel as the land or the rent: the land was limited to C. and D., the covenant was by C. alone; the use of the rent would, according to the terms in which it was limited, have been executed in A. and B. and their heirs, and the covenant was with A. and B. and the heirs of A.

But without entering into a further discussion of this case, or of the ge-

every part thereof, and his, their, and every of their lands and tenements, goods and chattels, of, from, and against the moiety or half part so agreed to be paid by the said [*covenantor-purchaser*], his heirs, appointees, executors, administrators, or assigns, as aforesaid, of the said annuity or yearly rent-charge of 50*l.*, and of, and from, and against all actions, suits, causes of action and suit, claims, and demands whatsoever, on account of such moiety or half part of the said annuity or yearly rent-charge, or in anywise relating to such moiety or half part. AND *FURTHER, that in case the one moiety or half part so agreed to be paid by the said [*covenantor-purchaser*], his heirs, appointees, executors, administrators, or assigns, of the said annuity or yearly rent-charge of 50*l.* as aforesaid, shall happen to be in arrear and unpaid, and thereby, or by reason thereof, or by reason of any other matter, cause, or thing relating thereto, the trustee or trustees for the time being of the said hereinbefore recited indenture of the —— day of ——, shall take or recover possession of or enter into the receipt of the rents and profits of all or any part or parts of the said messuage or dwelling-house and premises hereby released, or intended so to be; or in case any distress or distresses shall be made on any part of the said premises for the recovering of the said one moiety or half part of the said annuity or yearly rent-charge, or any part of such moiety or half part; or in case any sale or sales shall be made or proposed to be made under the trusts of the said indenture of the —— day of ——, of the said

COVENANT TO PAY RENT-CHARGE, AND POWER OF DISTRESS BY WAY OF INDEMNITY.

Power of distress by way of indemnity.

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neral principles that govern the obligatory effect of covenants running with the land, (which are involved in some perplexity, and will afford subject for future comment), it will be sufficient to remark, as a practical suggestion arising from the preceding cases, that where a fee-farm rent is intended to be granted, which is to be accompanied by a covenant for payment, the grant should be simply of a rent-charge; and the owner of the inheritance of the land who enters into the covenant, should, on alienating the land, if he has both a power and an estate, convey by virtue of his ownership, and not execute his power. An effectual mode of insuring this would be to make him appoint to himself in fee, previously to his granting the rent; or, if the covenant to pay be contained in the deed conveying the property to him, he should be required to take the conveyance simply to himself in fee.

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messuage or dwelling-house and premises hereby released, or intended so to be, or any part thereof; or in case the said [*covenantee-purchaser*], his heirs, appointees, executors, administrators, or assigns, or the owner or owners, occupier or occupiers for the time being of the said last-mentioned premises, or of any part thereof, shall, for the purpose of avoiding a distress or entry, or sale, pay the said moiety or half part so agreed to be paid by the said [*covenantor-purchaser*], his heirs, appointees, executors, administrators, or assigns as aforesaid, of the said annuity or yearly rent-charge of 50*l.*, or any part of such moiety or half part; then and in any of such cases, and so often as the same shall happen, it shall be lawful for the said [*covenantee*], his heirs, appointees, executors, administrators, or assigns, or any of them, or the owner or owners, occupier or occupiers for the time being of the said messuage or dwelling-house and premises hereby released, or intended so to be, or of any part or parts thereof, upon which such distress or entry shall be made, or of which such sale shall be made, or proposed to be made, or who shall make such voluntary payment to avoid a distress or entry or sale as aforesaid, from time to time to enter into and distrain upon all or any part of the said messuage or dwelling-house and hereditaments so pur-

[*289] *chased by and conveyed to the said [*covenantor-purchaser*], as hereinbefore recited, for all such sum and sums of money, costs, charges, and expenses as he the said [*covenantee-purchaser*], his heirs, appointees, executors, administrators, or assigns, or any of them, or such owner or owners, occupier or occupiers for the time being of the premises hereby released as aforesaid, shall have paid, sustained, or incurred by reason of such distress or distresses or entry, or in order to avoid such distress or distresses or entry, or sale as aforesaid, and also to take, drive, carry away, and impound, and in pound to detain and keep the said distress and distresses, and to sell and dispose of the same according to law, in like manner as in cases of distresses taken for rent reserved upon common demises or leases for years, to the intent and purpose that the said [*covenantee-purchaser*], his heirs, appointees, executors, administrators, and assigns, and the owner and owners, occupier and occupiers for the time being, of the said mes-

suage or dwelling-house and premises hereby released, or intended so to be, shall and may, by the ways and means hereinbefore provided, be fully reimbursed and satisfied all such sum and sums of money, costs, charges, damages, and expenses, as he, they, or any of them, shall or may pay, sustain, or incur, by reason of the non-payment by the said [*covenantor*], his heirs, appointees, executors, administrators, or assigns, of the said one moiety or half part so agreed to be paid by him or them, of the said annuity or yearly rent-charge of 50*l.*, as hereinbefore mentioned. IN WITNESS, &c.

COVENANT TO PAY RENT-CHARGE, AND POWER OF DISTRESS BY WAY OF INDEMNITY.

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DEED *of* APPORTIONMENT *of* RENT *between two* PURCHASERS *of Premises held under one* LEASE, *with mutual* POWERS *of* DISTRESS *by way of* INDEMNITY.

APPORTIONMENT OF RENT OF LEASE AMONG ASSIGNEES, WITH MUTUAL POWERS OF DISTRESS.

THIS INDENTURE, made, &c., BETWEEN [A. B.], of the one part; and [C. D.], of the other part. WHEREAS by indenture of lease, bearing date &c., *(recital of a lease of a piece of ground, and two messuages thereon, to* [lessee] *for ninety-nine years, at the rent of* 14*l.* 18*s.*, *and an additional rent of* 50*l. in case certain trades were carried on therein).* AND WHEREAS the said [*lessee*] did on or about the —— day of ——, cause the said messuages, tenements, and premises comprised in the said recited indenture of lease to be put up to sale by auction, in two distinct lots, pursuant to printed particulars and conditions, published previously to such sale, at which the said [A. B.] and [C. D.] attended, and being the highest bidders for, were declared the purchasers of the messuages or tenements and premises comprised in the said recited indenture of lease, that is to say, the said [A. B.] of one of the said messuages, with the appurtenances, being No. 2, in ——, at or for the price or sum of —— pounds; and the said [C. D.] of the other of the said messuages, with the appurtenances, being No. 3, in —— aforesaid, at or

Parties.

Recital of lease.

Recital of sale by auction.

APPORTIONMENT OF RENT OF LEASE AMONG ASSIGNEES, WITH MUTUAL POWERS OF DISTRESS.

for the price or sum of —— pounds. And whereas by indenture of assignment bearing even date with, but executed previously to the execution of these presents, and made between the said [*lessee*], of the first part; the said [A. B.] of the second part; and the said [C. D.] of the third part, in consideration of the sum of —— pounds, to the said [*lessee*] paid by the said [A. B.], he the said [*lessee*] hath granted, bargained, sold, assigned, transferred, and set over unto the said [A. B.], his executors, administrators, and assigns, *All that*, &c., *(describe parcels)*,

Recital of assignments to present purchasers.

[*291] **To hold* the same unto the said [A. B.], his executors, administrators, and assigns, from the —— day of —— then last past, for all the residue then to come and unexpired of the said term of ninety-nine years, by the said recited indenture of lease granted, subject, nevertheless, to the payment of the yearly rent of 7*l.* 9*s.*, being one moiety or half part of the said yearly rent or sum of 14*l.* 18*s.* by the said indenture of lease reserved and made payable, and subject also to the performance of the covenants, conditions, and agreements, in the same indenture of lease inserted and contained, so far only as the same relate to and concern the messuage or tenement and premises thereby assigned: And whereas by another indenture of assignment, also bearing date, &c. *(recital of assignment of the other house to C. D., in same form)*; And whereas by the conditions of the said recited sale, it was stipulated that each of them, the said [A. B.] and [C. D.], the purchasers of the said messuages, or tenements, and premises, should pay the yearly rent of 7*l.* 9*s.* in respect of the premises by him purchased, being one moiety of the said yearly rent of 14*l.* 18*s.* reserved by the said recited indenture of lease: And whereas for the more effectually apportioning the said yearly rent or sum of 14*l.* 18*s.* between them the said [A. B.] and [C. D.], and their executors, administrators, and assigns, and for indemnifying each of them, and his executors, administrators, and assigns, and the premises by him purchased, from the rents, covenants, and agreements reserved and contained in the said recited indenture of lease, which ought to be paid, kept, done, and performed in respect of the premises purchased by the other of them, it hath been mutually agreed between the

Recital of agreement for apportionment of rent and indemnity.

said [A. B.] and [C. D.] that they shall respectively enter into such covenants and agreements as are hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited agreement, and for and in consideration of the covenants hereinafter contained, on the part of the said [C. D.], his heirs, executors, and administrators, he the said [A. B.], for himself, his heirs, executors, and administrators, doth hereby covenant, promise, grant, and agree to and with the said [C. D.], his executors, administrators, and assigns, in manner following, that is to say, that he the said [A. B.], his executors, administrators, and assigns, shall and will from time to time, and at all times hereafter, during the residue yet to come and unexpired of the said term of ninety-nine years, by the said recited indenture of lease granted as aforesaid, well and truly pay, or cause to be paid, unto the said [C. D.], his executors, administrators, or assigns, or unto such person or persons as shall from time to time be entitled to receive the said ground-rent or sum of 14*l.* 18*s.* reserved by the said recited indenture of lease, the clear yearly rent or sum of 7*l.* 9*s.*, being one moiety or half part of the said ground-rent or sum of 14*l.* 18*s.* when and as the same shall become due and payable, according to the true intent and meaning of the same indenture of lease, and shall and will well and truly pay, or cause to be paid, the said increased rent of 50*l.* in case the same shall become payable, and so far as the same is or shall be occasioned by the said [A. B.], his executors, administrators, under-tenants, or assigns; *And* shall and will, during the continuance of the said term, perform, fulfil, and keep all and singular the covenants, stipulations, and agreements inserted and contained in the said recited indenture of lease, on the part of the said [A. B.], his executors, administrators, and assigns, to be kept, done, and performed, so far as such covenants, stipulations, and agreements relate to or concern, or ought to be kept, done, and performed in respect or on account of the said messuage or tenement and premises so purchased by him the said [A. B.], and comprised in the said firstly recited indenture of assignment bearing even date herewith; and of and from a moiety or half part of the said yearly rent or sum of 14*l.* 18*s.*, and of and from the said

APPORTIONMENT OF RENT OF LEASE AMONG ASSIGNEES, WITH MUTUAL POWERS OF DISTRESS.

Testatum.

Covenant to pay moiety of rent.

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Covenant by [A. B.] to pay increased rent, if same shall become payable through his means;

And perform covenants as far as respects his part of the premises.

And to indemnify the other pur-

APPORTIONMENT OF RENT OF LEASE AMONG ASSIGNEES, WITH MUTUAL POWERS OF DISTRESS.

chaser therefrom.

increased rent, so far as the same shall be occasioned by the said [A. B.], his executors, administrators, under-tenants, or assigns, and of and from the said covenants, stipulations, and agreements, so far as they respectively relate to or concern, or ought to be kept and observed in respect or on account of the said messuage, or tenement, and premises so purchased by the said [A. B.] as aforesaid, and of and from every neglect, breach, or default, which shall or may at any time or times hereafter happen in the payment or performance thereof respectively, shall and

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*will save, defend, keep harmless and indemnified the said [C. D.], his executors, administrators and assigns, and his and their lands and tenements, goods and chattels; AND MOREOVER that in case the said [C. D.], his executors, administrators or assigns, shall at any time or times hereafter pay, bear, sustain, or be put unto any sum or sums of money, costs, charges, or expenses, for, or on account or in respect of the said yearly rent or sum of 7*l.* 9*s.* or of the said increased rent, covenants, and agreements hereinbefore covenanted and agreed to be paid, kept, done, and performed by the said [A. B.], his executors, administrators, and assigns as aforesaid, or any of them, then, and in every such case, and so often as the same shall happen, it shall be lawful for the said [C. D.], his executors, administrators, and assigns, into and upon the said messuage, tenement, and premises so purchased by the said [A. B]., and comprised in the said firstly recited indenture of assignment, bearing even date herewith, to enter and distrain for all and every such sum and sums of money, costs, charges, and expenses which he the said [C. D.], his executors, administrators or assigns, shall so pay, bear, sustain, expend, be at, or be put unto, and the distress and distresses then and there found, to take, lead, drive, carry away and impound, and in pound to detain and keep, until the same sum and sums of money, costs, charges, and expenses, and all costs, charges, and expenses whatsoever, sustained or occasioned by, or attending the making, taking, and keeping any such distress or distresses, shall be fully paid and satisfied; and in default of payment thereof, in due time after such distress or distresses shall be made and taken as aforesaid, to appraise, sell, and dispose of

Power to distrain on breach of covenants.

such distress or distresses, or any part thereof, or otherwise to act in regard thereto, according to the due course of law, in like manner as in case of distress for non-payment of rent reserved on common leases, to the intent that thereby and therewith the said [C. D.], his executors, administrators and assigns, shall and may be fully paid and satisfied all and every such sums and sum of money, costs, charges, and expenses as aforesaid. AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said recited agreement, and for and in *consideration of the covenants hereinbefore contained on the part of the said [A. B.], his heirs, executors, and administrators, he, the said [C. D.], for himself, his heirs, executors, and administrators, doth hereby covenant, promise, grant, and agree with and to the said [A. B.], his executors, administrators, and assigns, in manner following, that is to say, (*the same covenants* mutatis mutandis *as before*). IN WITNESS, &c.

APPORTIONMENT OF RENT OF LEASE AMONG ASSIGNEES, WITH MUTUAL POWERS OF DISTRESS.

Further *testatum.*

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DEED *declaring the* TRUSTS *of a* SUM *of* MONEY *invested by Devisees in Trust for Sale, to* INDEMNIFY *a* PURCHASER *for twenty Years, against certain* TITHES, *there being no Evidence in Support of the* MODUSES *alleged to be payable in lieu of such Tithes.* COVENANT *by* [*Cestuis que Trust*], *(who are made consenting Parties to the Arrangement), to* INDEMNIFY. *Provisions enabling the Purchaser to admit Claims without Suit; for ascertaining the Amount of Compensation, &c.* POWER *to* VARY FUNDS *and appoint* NEW TRUSTEES.

DECLARATION OF TRUSTS OF MONEY, INVESTED TO INDEMNIFY A PURCHASER AGAINST TITHES.

THIS INDENTURE, made &c., BETWEEN [*devisees in trust for sale*], of the first part; [*cestuis que trust*], of the second part; [*purchaser*], of the third part; and [*trustees of the indemnifying fund*], of the fourth part. *(Recite the will of T. L., deceased, whereby the lands in ques-*

Parties.

Recitals.

DECLARATION OF TRUSTS OF MONEY, INVESTED TO INDEMNIFY A PURCHASER AGAINST TITHES.

tion were devised to the parties of the first part, in trust for sale, and the produce of the sale disposed of in favour of the parties of the second part). And whereas the said [*devisees for sale*], in execution of the aforesaid trust for sale reposed in them by the said recited will, lately contracted and agreed with the said [*purchaser*] for the absolute sale to him as well of the freehold, capital, and other messuages, cottages, lands, tenements, and hereditaments hereinafter mentioned, as of the leasehold tenements hereinafter also mentioned, with their respective

—of contract for sale.

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*appurtenances (*a*), (late the estate of the said [T. L.],) at the entire price of 50,000*l.* And whereas the particular of the said freehold and leasehold hereditaments and premises, contained in a printed schedule annexed to the contract entered into between the said [*devisees for sale*] and the said [*purchaser*], for the sale to the said [*purchaser*] of the said hereditaments, concluded with an assertion or representation in the words following, (namely), "there is a small modus in lieu of vicarial tithes in both parishes," (meaning the said parishes of [A.] and [B.], in which the said hereditaments and premises are in the same schedule described to be situate). And whereas it appears, in opposition to the said statement or representation, that the vicar of the said parish of [A.], which is a vicarage endowed, is entitled or claims to be entitled to, and has been accustomed to receive, one-third part or share, (the rector impropriate of the same parish being entitled, or claiming to be entitled, to the remaining two-third parts or shares), of the several tithes arising or renewing within the same parish, and to be taken in kind, hereinafter particularly mentioned, that is to say, *turnips* and *peas*, one-tenth, if set by the plough, but nothing if set by the spade, &c., *(enumerate other tithes)*, and the said vicar is also entitled or claims to be entitled to, or has been accustomed to receive, one-third part or share (the rector impropriate of the same parish being entitled,

—of particulars of sale alleging the existence of a modus in lieu of vicarial tithes.

—of certain tithes being ascertained to be payable.

—of the moduses to which the vicar and perpetual curate of

(*a*) In this case the lands of inheritance, and the leaseholds for lives, were purchased at an entire price, but they were conveyed by separate assurances, the purchase-money being apportioned.

or claiming to be entitled to the remaining two-third parts or shares) of such moduses, or pecuniary payments in the nature of moduses or compositions for or in lieu of other titheable matters, arising or renewing within the same parish, as are hereinafter particularized, that is to say, *hay*, two pence for each farm in lieu of tithe hay, that is, each occupier of lands pays two pence in lieu of tithe hay, at a given time of the year, *viz.* at Midsummer-day; *cows*, eight pence for each milch cow, in lieu of tithe milch, also payable at Midsummer; *bees*, four pence for bees in lieu of tithes, payable at Midsummer; *colts* and *fillies*, one penny *is paid for each colt, by way of tithe, payable at Midsummer; and three half pence, for each filly when a year old, &c. And the perpetual curate of the said parish of [B.] is entitled or claims to be entitled to, or has been accustomed to receive such moduses or pecuniary payments in the nature of moduses, or compositions for or in lieu of the tithes or tenths of titheable matters arising or renewing within the same parish, as are hereinafter particularized, that is to say, *(enumerate moduses)*. AND WHEREAS in pursuance of the said recited contract, by indentures of lease and release, the indenture of lease bearing date the day next before the day of the date of these presents, and the indenture of release bearing even date with, and executed immediately before the execution of these presents, and made between the said [*devisees for sale*], of the first part; the said [*cestuis que trust*], of the second part; the said [*purchaser*], of the third part; and [*purchaser's trustee*], of the fourth part; divers freehold, capital, and other messuages, farms, lands, tenements, and hereditaments therein particularly described and mentioned to be situate in the said several parishes of [A.] and [B.], in the said county of [S.], with their appurtenances, have, in consideration of the sum of 42,000*l.* (being part of the said purchase-money of 50,000*l.*, and being the apportioned consideration for the said freehold lands of inheritance,) paid by the said [*purchaser*] to the said [*devisees for sale*], to be disposed of by them, according to the trusts of the said recited will, been conveyed, assured, and limited, to such uses, for such estate or estates, in such proportions, for such intents and purposes, and in such manner as

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the several parishes are entitled.

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Recital of conveyance of lands of inheritance;

To purchaser to uses to prevent dower.

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the said [*purchaser*] shall at any time, or from time to time, by any deed or deeds, direct or appoint; and in default of such direction or appointment, to the use of the said [*purchaser*] and his assigns, during the term of his natural life, without impeachment of waste; and from and immediately after the determinatio nof that estate by any means in his lifetime, to the use of the said [*trustee*], his executors and administrators, during the life of the said [*purchaser*], upon trust nevertheless for the only benefit of the said [*purchaser*] and his assigns; with remainder to the use of the said [*purchaser*], his heirs and assigns, for ever. And whereas, by other indentures of lease and *release of the same dates respectively, the indenture of release being made between the same parties of the first and second parts, and said [*purchaser*] of the third part, certain leasehold tenements and hereditaments therein particularly described, situate in the said parishes of [A.] and [B.], or one of them, with their appurtenances, have, in consideration of the sum of 8000*l.* (being the residue of the said purchase-money of 50,000*l.*, and being the apportioned consideration for the said leasehold tenements and hereditaments), paid by the said [*purchaser*] to the said [*devisees for sale*], to be disposed of by them according to the trusts of the said recited will, have conveyed and assured unto and to the use of the said [*purchaser*], his heirs and assigns, for the term of the natural lives of the several persons therein named, and for whose lives the same leasehold tenements are respectively held. And whereas the said purchase was completed under an agreement, that compensation should be made to the said [*purchaser*], in respect of the value of the third part or share payable to the vicar of the said parish of [A.], of the matters titheable in kind within the same parish as aforesaid, and which value has accordingly been estimated by a surveyor to whom the valuation thereof was referred by the said [*devisees for sale*] and the said [*purchaser*], at the sum of £——, which sum has been paid or allowed by the said [*devisees for sale*] to the said [*purchaser*], as a compensation in respect of the tithes in kind so payable to the said vicar. And whereas no proof has been adduced by the said [*devisees for sale*], in support of the validity of any of

—of conveyance of leaseholds for lives.

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Deduction from purchase-money, on account of tithes in kind.

—that no proof had been adduc-

the said moduses, payments, or compositions, whereof one-third part is payable to the said vicar of [A.] as aforesaid, or of the said moduses, payments, or compositions payable to the perpetual curate of [B.] as aforesaid; and the said [*purchaser*] having, previously to the completion of the said purchase, required an effectual indemnity against the payment to the said vicar and perpetual curate respectively, of tithes in kind of any of the titheable matters covered or claimed to be covered by the moduses, payments, or compositions aforesaid, and from all liabilities by reason of the invalidity or insufficiency of such moduses, payments, or compositions, or any of them, or by reason of any other *matters arising out of the aforesaid statement or representation in the said printed schedule or particular, and not compensated for by the sum so deducted and retained by the said [*purchaser*] as aforesaid; the said [*devisees for sale*], with the privity and approbation of the said several other parties hereto of the second part, proposed and agreed to indemnify the said freehold and leasehold hereditaments and premises so contracted to be sold as aforesaid, against such payments or liabilities as aforesaid, for the period of twenty years from the completion of the said purchase, by investing the sum of 800*l.*, part of the said purchase-money, in the names of trustees, upon proper trusts for that purpose hereinafter contained, and by the covenant of the said several parties hereto of the second part; and the said purchase was completed upon the faith of such proposal and agreement. AND WHEREAS, in pursuance of the said proposal and agreement in this behalf, the said [*devisees for sale*] have immediately before the execution of these presents, with the privity and approbation of the said several parties hereto of the second part, and of the said [*purchaser*], laid out and invested the sum of 800*l.*, part of the said purchase-money, in the purchase of 950*l.* three *per cent.* Consolidated Bank Annuities, in the names of the said [A. B.], (a trustee nominated by and on the behalf of the said [*devisees for sale*], as such trustees as aforesaid), and the said [C. D.], (a trustee nominated by and on the behalf of the said [*purchaser*],) and the same Bank Annuities are now standing in the names of the said [A. B.] and [C. D.] in the books of

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ed in support of the moduses.

—of requisition of indemnity by purchaser.

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RECITALS.

—of agreement to invest 800*l.* for the purpose of indemnity.

—That this sum had been invested in stock accordingly.

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the Bank of England. NOW THIS INDENTURE WITNESSETH, that in further pursuance of the said proposal and agreement in this behalf, it is hereby declared by and between the said parties to these presents, that the said [*trustees*] and the survivor of them, their and his executors, administrators, and assigns, shall henceforth stand possessed of and be interested in the said sum of 950*l.* three *per cent.* Consolidated Bank Annuities, upon the trusts following, namely, UPON TRUST to save harmless and keep indemnified the said freehold and leasehold hereditaments and premises comprised in the said several recited indentures of release respectively, of even date *herewith, and every part thereof, with their appurtenances, and the said [*purchaser*], his appointees, executors, administrators, and assigns, in respect thereof, from and against all sum and sums of money, costs, losses, damages, and expenses by reason or in consequence of any claims or demands, actions, suits, or other proceedings at law or in equity, to be made, set up, commenced or instituted at any time or times during the term of twenty years, to be computed from the day of the date of these presents, for tithes or tenths in kind of all or any of the said several titheable matters, arising within the said parish of [A.] hereinbefore mentioned to be covered by the said moduses, payments, or compositions, whereof one-third is payable to the vicar of the same parish as aforesaid, or for tithes or tenths in kind of all or any of the several titheable matters arising within the parish of [B.], hereinbefore mentioned to be covered by the said moduses, payments, or compositions payable to the perpetual curate of the same parish as aforesaid, or for any other tithes or tenths in kind, arising, renewing, or belonging to the said vicar of [A.], (other than and except only the tithes or tenths which have been so valued as aforesaid, and in respect whereof an abatement has been made from the said purchase-money as aforesaid), or for any other tithes or tenths in kind, in the nature of small tithes, arising, renewing, or belonging to the perpetual curate or lay impropriator of the said parish of [B.], or for any modus, payment, or composition, or moduses, payments, or compositions in lieu or in respect of any titheable matters within the said parishes

Testatum.

Trustees to stand possessed of stock;

In trust to indemnify the purchaser, &c. against any claims to tithes, &c., to be set up within twenty years.

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respectively, other than the said moduses, payments, or compositions hereinbefore particularized; AND in case, therefore, the said [*purchaser*], his heirs, appointees, executors, administrators, or assigns, or any of them, in respect of the said freehold and leasehold hereditaments and premises, or any of them, or any part or parts thereof respectively, shall pay, sustain, or incur, or become liable to pay, sustain, or incur any such sum or sums of money, costs, losses, damages or expenses as aforesaid; *Then*, and from time to time so often as the same shall happen, at the request of the said [*purchaser*], his heirs, appointees, executors, administrators, or assigns, by, with, or out of the dividends or *annual produce of the said Bank Annuities, or by sale of the same Bank Annuities, or a competent part thereof, to pay and satisfy the same sum or sums of money, costs, losses, damages, or expenses, together with all the expenses of raising the same, and of carrying these present trusts into execution; And subject to the trusts aforesaid, UPON TRUST to permit and suffer the said [*devisees for sale*], as trustees of the said recited will of the said [*testator*], or the survivors or survivor of them, their or his executors, administrators, or assigns, to receive the dividends or annual produce of the said Bank Annuities; *And* after the expiration of the said term of twenty years, and after full payment and satisfaction of all such sum or sums of money, costs, losses, damages, and expenses (if any) as aforesaid, then, as to the said Bank Annuities, or so much thereof as shall not have been sold and disposed of for the purposes aforesaid, UPON TRUST to pay or transfer the same unto the said [*devisees for sale*], as such trustees as aforesaid, or the survivors or survivor of them, their or his executors, administrators, or assigns. AND the said parties hereto of the second part, do hereby for themselves, their heirs, executors, and administrators, and each of them doth for himself and herself, his and her heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his appointees, executors, administrators, and assigns, that the said several parties hereto of the second part, or some or one of them, their, or some or one of their heirs, executors, or administrators, will or shall effectually save harmless

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And for that purpose to apply the fund in satisfaction of losses, &c., to be incurred.

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—To permit vendors to receive dividends in meantime.

At the expiration of twenty years to assign fund.

Covenant by *cestuis que trust* to indemnify purchaser.

DECLARATION OF TRUSTS OF MONEY, INVESTED TO INDEMNIFY A PURCHASER AGAINST TITHES.

and keep indemnified the said [*purchaser*], his heirs, appointees, executors, administrators, and assigns, and the said freehold and leasehold hereditaments and premises, from and against all such claims and demands, actions, suits, and other proceedings, sum and sums of money, costs, losses, damages, and expenses as aforesaid.

Purchaser not to be obliged to contest claims.

PROVIDED NEVERTHELESS, *and it is hereby further declared*, that it shall not be requisite for the said [*purchaser*], his heirs, appointees, executors, administrators or assigns, in order to entitle himself or themselves to the benefit of the indemnity hereinbefore provided, to contest any such claim or demand as aforesaid, but that he or they shall be at liberty to admit the same upon such

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*evidence as his or their counsel in the law shall advise to be sufficient.

Provision for ascertaining value of deterioration by reason of the invalidity of moduses.

PROVIDED ALSO, *and it is hereby further declared*, that in case the invalidity or insufficiency of the said moduses, payments, or compositions, or any of them, or the right of the said vicar, perpetual curate, or lay impropriator, to any tithes or tenths in kind, to which the indemnity hereinbefore provided extends, or to any further and other moduses, payments, or compositions, than those which are hereinbefore particularized, shall be established or proved in any action, suit, or proceeding to be commenced or instituted as aforesaid, or by the admission of any such claim or demand as aforesaid, then the said indemnity hereinbefore provided shall extend to compensate the said [*purchaser*], his executors, administrators, or assigns, for the consequent diminution or deterioration in the value of the said freehold and leasehold hereditaments and premises so purchased by him as aforesaid, or any of them, or any part or parts thereof, which shall be affected thereby; and for that purpose, it shall, in every such case, stand referred to two competent surveyors, one to be named by the said [*devisees for sale*], or the survivors or survivor of them, their or his executors, administrators, or assigns, and the other by the said [*purchaser*], his executors, administrators, or assigns; or if either party shall refuse or neglect to name a surveyor for the space of one calendar month after being required so to do by the other party, then, by two competent surveyors to be named by the said other party, to ascertain and determine what sum

Reference to surveyors to be chosen by the respective parties.

of money ought to be paid to the said [*purchaser*], his executors, administrators, or assigns, as a compensation in respect of the value of the fee-simple of the tithes in kind hereinbefore mentioned to be covered by the moduses, payments, or compositions, or modus, payment, or composition, so appearing to be invalid or insufficient as aforesaid, or of the other tithes or tenths, moduses, payments, or compositions, to which a right shall be proved or established as aforesaid, and such sum shall be accordingly raised under the trusts hereinbefore contained, and paid to the said [*purchaser*], his executors, administrators, or assigns, (such sum to be considered as between his real and *personal representatives as part of his personal estate (*a*)): And from and immediately after such payment, and after full payment and satisfaction of all sum or sums of money, costs, losses, damages, and expenses which the said [*purchaser*], his heirs, appointees, executors, administrators, or assigns, shall have paid, sustained, or incurred by reason of any claim or demand, action, suit, or other proceeding, which shall, previously to such payment, have been made, set up, commenced, or instituted against him or them, or any of them, or the said freehold and leasehold hereditaments and premises, or any of them, or any part or parts thereof, for recovering or enforcing payment of the tithes or tenths, in respect whereof such compensation shall be made as aforesaid, the indemnity hereinbefore provided, so far as concerns the same tithes or tenths, but not further or otherwise, shall cease and determine. PROVIDED ALSO, *and it is hereby further declared and agreed*, that if any claim or demand, action, suit, or other proceeding, to be made, set up, commenced, instituted, or originated during the said term of twenty years, shall be pursued, prosecuted, or carried on beyond the expiration of the same term, then the indemnity hereinbefore provided shall continue to subsist, and be available for protecting and in-

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Amount so ascertained to be paid to purchaser, his executors, &c.

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After compensation made indemnity to cease *pro tanto*.

Provision in case any claim, originating within twenty years, should be prosecuted beyond such period.

(*a*) It seems to be most reasonable, that, as between the real and personal representatives, the money should be restored to the personal estate, from which it proceeded. The present transaction operates as a diminution *pro tanto* of the purchase.

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demnifying the said [*purchaser*], his heirs, appointees, executors, administrators, and assigns, and the said freehold and leasehold hereditaments and premises in respect thereof. PROVIDED ALSO, *and it is hereby further declared*, that it shall be lawful for the said [*trustees*], and the survivor of them, his executors, or administrators, during the continuance of the trusts hereby created, with the consent in writing of the said [*devisees for sale*], (as such trustees as aforesaid), or the survivors or survivor of them, their or his executors, administrators, or assigns, and of the said [*purchaser*], his executors, administrators, or assigns, to sell the said sum of 950*l.* three *per cent.* Consolidated Bank Annuities, so transferred into the names of the

Power to trustees to vary funds with consent.

[*303] *said trustees as aforesaid, and to invest the money to arise from such sale in any other public stocks or funds, or other government securities, or any real securities in the united kingdom, and from time to time vary and transpose the same, as often as occasion shall require, or as shall be thought fit; and the said stocks, funds, or securities upon which the produce of the said Bank Annuities shall be invested by virtue of this provision, shall be subject to all the trusts hereinbefore expressed and declared concerning the same Bank Annuities. PROVIDED ALSO, *and it is hereby further declared* (*a*), that, in case the said [A. B.] or any trustee to be appointed in his stead, under this present provision, shall die, or become unwilling or unable to act in the trusts aforesaid, before the same shall be fully performed, it shall be lawful for the said [*devisees for sale*], (as such trustees as aforesaid), or the survivors or survivor of them, their or his executors, administrators, or assigns, to appoint any fit person to supply the place of the trustee so dying, or becoming unwilling or unable to act, and that in case the said [C. D.], or any trustee to be appointed in his place, under this present provision, shall die, or become unwilling or unable to act in the execution of

Power of appointing new trustees, each party supplying the vacancy in respect of his own trustee.

(*a*) The editor has been induced to add this form to the powers of the same nature, before stated, (*vide ante*, p. 262, 271), on account of the extreme conciseness with which the provision for enabling each party to supply the vacancy occasioned by the death, &c. of *his own* trustee, is introduced.

the aforesaid trusts, before the same shall be fully performed, then it shall be lawful for the said [*purchaser*], his heirs, appointees, executors, administrators, or assigns, to appoint any fit person to supply the place of the trustee so dying, or becoming unwilling or unable to act as trustee as aforesaid; and that upon every such appointment the said trust fund shall be assigned and transferred, so and in such manner as that the same may vest jointly in any new and old trustees, or solely in the new trustees, as occasion shall require, and the said new trustees shall be entitled to all such powers and authorities as are hereby given to the trustees hereby appointed. (*Add usual indemnities to trustees*). IN WITNESS, &c.

INDEMNITY *to a* PURCHASER *against* MORTGAGE DEBTS, (*supposed to be paid off, but of which there was no Evidence*), *by* CONVEYANCE *of* ANOTHER ESTATE *to* TRUSTEES.

THIS INDENTURE, &c. BETWEEN [*vendor*], of the first part; [*purchaser*], of the second part; [*trustees*], of the third part. WHEREAS, (*Recite the contract for the purchase, and the conveyance to the purchaser to uses to bar dower*). AND WHEREAS, upon investigating the title of the said [*vendor*] to the said messuages, &c. so purchased by the said [*purchaser*] as aforesaid, it appears that the same messuages, &c. are comprised in indentures of lease and release bearing date, &c., the release being made, &c. (being a settlement made previously to and in consideration of the marriage then intended and afterwards solemnized between [A. B.] and [C. D.]), and it appears by the same indenture of release and settlement, that the said messuages, &c. with other lands and hereditaments therein comprised, were, at the time of the date and execution thereof, subject to the several debts or sums of money, and securities for the same mentioned in the schedule thereunder written, (that is to say), (*here specify the secu-*

INDEMNITY TO A PURCHASER AGAINST MORTGAGE DEBTS BY CONVEYANCE OF ANOTHER ESTATE.

—that vendor states they are paid off.

No positive evidence of such facts.

rities). And whereas it is stated by the said [*vendor*] that the said several sums mentioned in the schedule to the said recited indenture of release, and all interest for or in respect of the same, have been long since paid and satisfied, and the hereditaments comprised in the said lastly recited indentures of lease and release or settlement duly exonerated from the same; but no positive evidence can at present be obtained that the securities for the said several sums of money have been transferred or conveyed since the date and execution of the said indentures of lease and release or settlement, or that the said several sums of money have been paid, except the said sum of £——

[*305] *secured to the said —— as aforesaid, and which appears, by a receipt indorsed upon the said mortgage, to have been paid; and therefore, upon the treaty for the purchase so made by the said [*purchaser*] as aforesaid, the said [*vendor*] proposed and agreed, and the said purchase was made upon the express stipulation that the said [*vendor*] should convey unto trustees, to be named by the said [*purchaser*], and to their heirs, the hereditaments hereinafter mentioned and expressed to be hereby released, upon such trusts for the indemnity of the said [*purchaser*], his heirs, appointees, and assigns, and the hereditaments by him purchased as aforesaid, as hereinafter declared. NOW

Agreement for the indemnity.

Testatum. THIS INDENTURE WITNESSETH, that, in pursuance of the said recited agreement, and in consideration of the premises, and of the sum of 5*s.* &c., He, the said [*vendor*], at the request, &c. of the said [*purchaser*], *hath* granted, bargained, sold, aliened, released, and confirmed, and by these presents *doth* &c. unto the said [*trustees*], (in their actual possession, &c.), and to their heirs, all &c. *(describe the parcels);* To have and to hold the said lands and other hereditaments hereinbefore described and expressed to be hereby released, with their appurtenances, unto the said [*trustees*] and their heirs for ever; To the use of the said [*trustees*], and their heirs and assigns; *Nevertheless* In trust for saving harmless and keeping indemnified the said [*purchaser*], his heirs, appointees, and assigns, and the messuages and other hereditaments so purchased by, and conveyed, or intended to be conveyed, to him, in and by the said indenture of release bearing even

Grant.

Habendum.

To the use of the trustees.

In trust to indemnify.

INDEMNITY TO A PURCHASER AGAINST MORTGAGE DEBTS BY CONVEYANCE OF ANOTHER ESTATE.

date herewith as aforesaid, of, from, and against the said several mortgages and securities for the said several sums mentioned in the schedule to the said indenture of release or settlement of the —— day of ——, and every or any of them, and of, from, and against the same several sums of money, and every or any of them, and the interest thereof respectively; *And*, for that purpose, in case the said [*purchaser*], his heirs, appointees or assigns, shall at any time or times hereafter, in respect of the said messuages and other hereditaments by him purchased as aforesaid, or any of them, bear, sustain, expend, be put unto, or pay any sum or sums of money, loss, costs, charges, damages, or expenses, for

If the purchaser be put to expenses;

*or by reason or on account of the said several mortgages [*306] or securities, or any of them, or the said several sums of money, or any of them, or the interest thereof, or of any of them, or for or by reason or on account of any action, suit, or other proceeding, claim, or demand, which shall or may be brought, had, commenced, prosecuted, or made in respect, or by force or means of any of the said mortgages or securities, or for the recovery or compelling payment of the said several sums of money, or any of them, or any part thereof, then and in such case, and from time to time, as often as the same shall happen, IN TRUST that they the said [*trustees*], or the survivor of them, or the heirs of such survivor, do and shall at any time or times thereafter, at the request of the said [*purchaser*], his heirs, appointees, and assigns, but without any further or other authority or direction of, from, or by the said [*vendor*], by and out of the rents and profits of the said lands and other hereditaments expressed to be hereby released, or by mortgage, or absolute sale of all or any of the same lands and other hereditaments, with the appurtenances, by public sale or auction, or by private contract, and in such manner as the said [*trustees*], or the survivor of them, his heirs or assigns, shall think proper, levy and raise such sum and sums of money as will be sufficient to pay and satisfy unto the said [*purchaser*], his heirs, appointees, or assigns, all such sum or sums of money, loss, costs, charges, damages, and expenses, as he or they, or any of them, shall bear, pay, sustain, expend, or be put unto as

To raise monies out of the rents, or by mortgage or sale;

and pay same to purchaser, with interest.

INDEMNITY TO A PURCHASER AGAINST MORTGAGE DEBTS BY CONVEYANCE OF ANOTHER ESTATE.

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aforesaid: Together with interest (*a*), at the rate of 5*l. per cent. per annum*, on all such sum and sums of money and *expenses as aforesaid, from the time, or respective times, at which the same shall be respectively paid, advanced, or incurred by the said [*purchaser*], his heirs, appointees, or assigns: And also the costs, charges, and expenses which shall or may be incurred by or attending the execution of the trusts hereby created, and shall and do pay and apply the monies so to be levied and raised by the ways and means aforesaid, in payment and satisfaction thereof accordingly: And subject and without prejudice to the trusts aforesaid, UPON TRUST that they the said [*trustees*], and the survivor of them, his heirs and assigns, shall and do stand seised of and interested in all and singular the hereditaments and premises expressed to be hereby released, and the rents and profits thereof, or of so much thereof respectively as shall not be disposed of for the purposes, and under and by virtue of the trusts aforesaid; IN TRUST for the said [*vendor*], his heirs and assigns for ever. AND UPON FURTHER TRUST, that in case evidence shall be procured satisfactory to the counsel of the said [*purchaser*], his heirs, appointees, or assigns, that the said several sums, and all interest for or in respect of the same respectively, have been duly paid or satisfied unto the said [*mortgagees*] respectively, or their respective executors, administrators, or assigns; And in case the said [*vendor*], his executors, administrators, or assigns, shall, at his or their own costs and charges, cause or procure the said several mortgages so made to the said [*mortgagees*] as aforesaid, to be trans-

In trust as to residue unsold for vendor.

If evidence be procured that the incumbrances are satisfied,

and vendor procures them to be assigned to the purchaser;

As to making interest payable under indemnities.

(*a*) In comparatively few indemnity-deeds is provision made for payment of interest on the expenses which the party to be indemnified may incur, though the consideration is frequently an important one, particularly where the property is of a nature not to be immediately convertible; or the application of it, as in the present instance, depends upon the acts of third persons, whose delay to exercise their trust ought not to prejudice the party to be indemnified. In such cases interest should always be made payable. That interest is not payable under bonds or covenants of indemnity, without an express provision, see *Rigby* v. *Macnamara*, 2 Cox, 415; *Bell* v. *Free*, 1 Swanst. 90.

ferred or assured unto and to the use of the said [*purchaser*], his heirs, appointees, or assigns, or to such person or persons, and in such manner, as he or they shall direct or appoint: or procure evidence satisfactory to the counsel of the said [*purchaser*], his heirs, appointees, or assigns, that the same mortgages or securities have been already surrendered, or have otherwise become extinguished, and that the hereditaments so purchased by and conveyed to the said [*purchaser*], have been freed, exonerated, and discharged of and from the same respectively (*a*); Then they the said [*trustees*], and the survivor *of them, and the heirs or assigns of such survivor, shall and do at any time or times thereafter, and after the costs, charges, and expenses of the said [*trustees*] respectively, and of their respective heirs and assigns, in and about the execution of the trusts hereby created, shall be fully paid and satisfied, at the request, costs, and charges of the said [*vendor*], his heirs or assigns, convey and assure, or cause to be conveyed and assured unto and to the use of the said [*vendor*], his heirs and assigns, or as he or they shall direct, the hereditaments and premises expressed to be hereby released, or such of them, and such part and parts thereof, as shall then remain undisposed of, for the purposes aforesaid, freed and discharged of and from all incumbrances made, done, executed, or suffered by the said [*trustees*], their heirs and assigns, or any of them. [*Power of appointing new trustees and covenants for title*]. In WITNESS, &c.

(*a*) If it be intended that the trusts for indemnity shall expire if no claim is made within a given period, which seems to be a reasonable stipulation on the part of the vendor, add—

"or if no claim or demand by virtue of the said several securities shall be made for the period of —— years from the date of these presents."

BOND BY AN ASSIGNEE OF LEASEHOLDS TO INDEMNIFY LESSEE FROM RENT, &c.

BOND *given by the* PURCHASER *of* LEASEHOLD PREMISES, *to the* VENDOR (*the* LESSEE), INDEMNIFYING *him from the* RENT *and* COVENANTS *in the Lease.*

Obligation.

KNOW ALL MEN BY THESE PRESENTS, *That I,* [*obligor*], of &c., am held and firmly bound to [*obligee*], of &c., in the sum of £——, of lawful British money, to be paid to the said [*obligee*], his executors, administrators, or assigns, for which payment I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the —— day of ——, in the year of our Lord 18—.

Recital of lease;

WHEREAS, by an indenture of lease bearing date on or about the —— day of ——, made between [*lessor*], of the one part, and the above-named [*obligee*], of the other part; the said [*lessor*] did demise and lease unto the said [*obligee*], his executors, administrators, and assigns, All that messuage or dwelling-house, situate and being No. —— in —— street, in the city of ——, with the appurtenances, for the term of —— years thence next ensuing, at and under the yearly rent of £——, payable quarterly, and subject to certain covenants on the part of the said [*obligee*], his heirs, executors, administrators, and assigns, to be observed and performed: AND WHEREAS

—of contract for purchase.

the above-bounden [*obligor*] has contracted with the said [*obligee*] for the absolute purchase of the messuage and premises comprised in the said indenture of lease, for all

—Assignment of even date.

the residue of the said term thereby granted; And by an indenture of assignment, bearing even date with the above-written obligation, made between the said [*obligee*], of the one part, and the said [*obligor*], of the other part, the same premises have been, or are intended to be, assigned unto and vested in the said [*obligor*], his executors,

BOND BY AN ASSIGNEE OF LEASEHOLDS TO INDEMNIFY LESSEE FROM RENT, &c.

administrators, and assigns, for all the residue now to come and unexpired of the said term of —— years, at and under the rent, and subject to the covenants reserved and contained in the said indenture of lease, and on the lessee's part to be paid and performed: And whereas, upon the treaty for the said purchase, it was agreed between the said parties, that the said [*obligor*] should give and execute unto the said [*obligee*] a bond or obligation, with a condition to be thereunder written, as or to the effect hereinafter contained. Now the condition of the above-written obligation is such, that if the above-bounden [*obligor*], his heirs, executors, administrators, or assigns, shall and do, from time to time hereafter, pay the said rent of £——, and observe and perform the several covenants, conditions, and agreements, reserved and contained in the said recited indenture of lease, on the part of the [*lessee*], his heirs, executors, administrators, or assigns, to be paid, observed, and performed; *And also* if the said [*obligor*], his heirs, executors, administrators, or assigns, shall and do from time to time, and at all times hereafter, effectually keep indemnified the said [*obligee*], his heirs, executors, and administrators (*a*), from all actions, suits, and other proceedings which shall be commenced or prosecuted against the said [*obligee*], his heirs, executors, or administrators (*b*), and all costs, losses, damages, and expenses which they or any of them shall respectively incur or suffer, by reason of the non-observance or non-performance of the said covenants, conditions, and agreements, or any of them, or the non-payment of the said rent, or by reason of any matter or thing in anywise relating thereto; then the above written obligation to be void, otherwise to be and remain in full force and virtue (*c*).

—Agreement for indemnity.

Condition.

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(*a*) If the bond is given to the executors or administrators of a deceased lessee, add the words—

Variation where bond is given to executors, &c.

"and the heirs, executors, and administrators for the time being of the said [*testator*] or [*intestate*]."

(*b*) "or the heirs, executors, or administrators for the time being of the said [*testator*] or [*intestate*]."

(*c*) As the assignment of a lease (though followed by the lessor's ac- As to covenants,

BOND BY AN ASSIGNEE OF LEASEHOLDS TO INDEMNIFY LESSEE FROM RENT, &c.

ceptance of rent from the assignee), does not discharge the lessee from his express covenants, it is usual for the assignee to give him an indemnity against these covenants, either by bond, or, which is more frequent, by a covenant inserted in the assignment itself. This deed, however, is commonly in the custody of the covenantor (the assignee), and a bond is therefore sometimes preferred, and which has the additional advantage, that it binds the devisees of the obligor; for, as devisees can only be reached by specialties, for which an action of debt can be brought, (*vide ante*, Vol. I. p. 316), they would not be bound by a *covenant* of indemnity merely. But it is clear, that even without an express contract, the law will raise an implied obligation in the assignee of a lease to indemnify the lessee from the covenants contained in it; and, therefore, in a late case, where A. assigned to B. certain leasehold premises, subject to the covenants in the lease on the lessee's part to be performed, it was assumed that the executors of A. might maintain an action against B. for breach of the covenants of the lease, by reason whereof damages had been recovered against the assignors. The only point, indeed, contested by the defendant, was as to the *form* of the action, which it was contended should be an action of covenant; but the Court held that an action upon the case would lie. *Burnett* v. *Lynch*, 5 B. & C. 589; *S. C.* 8 D & R. 368; and see *Kinlyside* v. *Thornton*, 2 Blackst. 1111. But see *Jones* v. *Hill*, 7 Taunt. 391; *S. C.* 1 J. B. Moore, 100, which seems to be shaken by *Burnett* v. *Lynch*. As to the indemnity proper to be given by an assignee to an assignor, who is himself an assignee only, see *Staines* v. *Morris*, 1 Ves. & Bea. 8.

&c. of indemnity against the payment of rent.

Implied obligation.

Effect of bankruptcy upon such covenants.

A bond or covenant entered into by the assignee with the assignor of a lease to indemnify him from the rent and covenants, is not proveable under a commission of bankrupt against the obligor or covenantor. This was decided in reference to the statute of 5 Geo. 2, c. 30, *Mayor* v. *Steward*, 4 Burr. 2439, and the late bankrupt acts have made no alteration in this respect. The consequence, therefore, is, that the bankrupt continues liable notwithstanding his certificate, whether the bond were forfeited or the covenant broken before or after the bankruptcy, such bond or covenant being incapable of being the subject of valuation. *Young* v. *Taylor*, 2 J. B. Moore, 326; *S. C.* 3 Barn. & Ald. 521. In this case, though the bond had been forfeited before the bankruptcy, by non-payment of the rent, yet the obligee had not actually paid the money; and this circumstance was adverted to by several of the learned Judges. Where the lessee has paid the money, it is probable the Court would consider him in
[*312] the light of a surety in respect of *such payment, and as such entitled under the 52nd section of the late act, 6 Geo. 4, c. 16, to prove the amount, whether the payment was made before or after the issuing of the commission, (provided it was before a final dividend was declared); without prejudice, however, in the latter case, to dividends antecedently made. The

BOND BY AN ASSIGNEE OF LEASEHOLDS TO INDEMNIFY LESSEE FROM RENT, &c.

case of *Wood* v. *Dodgson*, 2 M. & S. 195, seems to afford some countenance to this view of the case, the principle being, it is apprehended, analogous, though the circumstances are different. A., B., and C. being in partnership, A. and B. retired from the concern, and assigned their shares to C., who covenanted to indemnify them from the debts; C. became bankrupt, and obtained his certificate. Subsequently to the issuing of the commission, A. and B. were sued for a debt owing by the partnership, which they accordingly paid. For the debt and costs recovered against them in this action, the present action was brought against the bankrupt, who pleaded his certificate; and the Court was of opinion that though, as between the parties and the creditor, the debt which the plaintiffs had paid was their own; yet, as between themselves, they were, by the effect of the arrangement at the dissolution, sureties only, the bankrupt having, by his covenant, constituted himself the principal debtor; the case, therefore, came within the stat. 49 Geo. 3; (this provision in which has been adopted in the late act)—the debt was proveable, and the certificate a bar.

Whether obligee in certain cases entitled to prove as surety.

Debt must exist at the time of the bankruptcy.

But it has been held, that though monies paid by a surety after the bankruptcy are proveable, yet, that the sum paid must be an existing debt at that time; and, therefore, where a person who had become surety for the bankrupt for the payment of a rent, paid certain sums of money, for *arrears accruing after the issuing of the commission*, it was held, that this was not a proveable debt, and the bankrupt continued liable. *M'Dougal* v. *Paton*, 2 J. B. Moore, 644; *S. C.* 8 Taunt. 315.

The doctrine of this case evidently applies to the case under consideration. If, therefore, the assignee of a lease gives a bond or covenant of indemnity to a lessee, and the obligor or covenantor becomes bankrupt, he continues liable to the lessee notwithstanding his certificate, in respect of the rent and covenants accruing and broken subsequently to the bankruptcy. And it is to be observed, that the acceptance of the lease by the assignees, does not discharge him from his liability under a bond or covenant of this description, the clause in the late bankrupt statutes discharging the lessee, where the assignees accept the lease, being confined to the case of *lessor* and *lessee*, and not extending to obligations between the lessee and his assignee. *Inglis* v. *Macdougal*, 1 J. B. Moore, 196; *Young* v. *Taylor*, 2 J. B. Moore, 326; *S. C.* 8 Taunt. 315; *S. C.* in B. R. 3 Barn. & Ald. 521.

Bonds of indemnity how to be stamped.

The stamp on a bond of indemnity is 1*l.* 15*s.* In the late case of *Lopez* v. *De Tastet*, 8 Taunt. 712; *S. C.* 2 J. B. Moore, 266, an objection was taken to a bond so stamped, on the ground that it was not *a bond of indemnity, but a bond for securing a "definite and certain sum [*313] of money," and, therefore, liable to an *ad valorem* stamp. The circumstances were these: A verdict had been found for the plaintiff in the cause, for the sum of 37,000*l.* A new trial was afterwards moved for, and the

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motion was acceded to on condition that the defendant should procure a bond from a third person, to secure to the plaintiff the sum to be recovered by the action, and costs, in case a similar verdict should be given on the second trial. The Court held the stamp to be sufficient; *Dallas*, C. J., said, "this cannot be considered as a bond for a sum certain, neither is it a bond for securing money to be lent, advanced, or paid, nor does it come within the clause as to bonds for the performance of covenants for payment of money. It is a mere indemnity bond, and is properly stamped."

BOND OF INDEMNITY AGAINST DOWER.

BOND *of* INDEMNITY *from a Vendor to a* PURCHASER *against the* DOWER *of Vendor's Wife.*

FORM *of Obligation* (ut ante, *p.* 309).

Recital of conveyance.

WHEREAS, by indentures of lease and release, bearing date respectively, the lease the day before the release, and the release even date with the above-written bond; and made between the above-bounden [*obligor*], of the first part; the above-named [*obligee*], of the second part; and [*trustee*] therein described, of the third part; in consideration of the sum of £——, to the said [*obligor*] paid by the said [*obligee*], the said [*obligor*] hath granted and released unto the said [*obligee*], and his heirs, all that, &c. *To hold* the same unto and to the use of, *or* in trust for, the said [*obligee*], his appointees, heirs, and assigns, in manner in the said indenture of release mentioned: AND WHEREAS upon the treaty for the purchase of the said premises, it was agreed that the said [*obligor*] should by his bond, in a sufficient penalty, indemnify the said [*obligee*], and the hereditaments by him purchased as aforesaid, of and from the dower or thirds of [*wife*], the wife of the said [*obligor*]; and in pursuance of the said agreement, the said [*obligor*] hath *agreed to execute the above-written bond, subject to such condition for making the same void as hereinafter contained. NOW THE CONDITION of the above-written obligation is such, that if the

—of agreement to indemnify.

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Condition.

said [*obligor*], his appointees, heirs, and assigns, shall and do from time to time, and at all times hereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuage or tenement and premises comprised in the said recited indenture of release, and expressed to be thereby released as aforesaid, free from and without any let, suit, trouble, denial, eviction, interruption, claim, or demand of, from, or by the said [*wife*], the wife of the said [*obligor*], or of, from, or by any person claiming, or to claim, by, from, through, or under her; *Then* the above-written obligation to be void, but otherwise to remain in full force and virtue.

BOND OF INDEMNITY AGAINST DOWER.

BOND *to a* PURCHASER *conditioned to* PROCURE *an* ASSIGNMENT *or* SURRENDER *of an outstanding satisfied* TERM, *and an Extinguishment of the* DOWER *of the Vendor's Wife, if required by any future Purchaser within twenty Years, and in the meantime to* INDEMNIFY *the* PURCHASER *from all* CLAIMS, *&c.*

BOND TO PROCURE AN ASSIGNMENT OF A TERM, AND RELEASE OF DOWER.

FORM *of obligation,* ut ante, *p.* 309.

WHEREAS the above-bounden [*obligor*] lately contracted and agreed with the above-named [*obligee*] for the absolute sale to him of the inheritance in fee-simple of a messuage or tenement, close, inclosed grounds, and hereditaments called ——, situate at ——, free from incumbrances, at the price of £——: AND WHEREAS by indentures of lease and release, the indenture of lease bearing date the day next before the day of the date of these presents; and the indenture of release bearing even date with and executed immediately before the execution of these presents, and made between [A. B.] of the first part; the said [*obligor*] of the second part, the said [*obligee*] of the third part; and [C. D.] of the fourth part; the said hereditaments have, in consideration of the sum of 5,500*l.*

Recitals.
Contract for sale.
Conveyance to purchaser.

BOND TO PROCURE AN ASSIGNMENT OF A TERM, AND RELEASE OF DOWER.

paid as therein is mentioned, been conveyed, assured, and limited to such uses as the said [*obligee*] shall by any deed or deeds appoint; and in default of such appointment, *To the use* of the said [*obligee*], and his assigns, during the term of his natural life, without impeachment of waste; with a limitation to the use of the said [C. D.], his executors and administrators, during the life of the said [*obligee*]; In trust for him and his assigns, with remainder to the use of the said [*obligee*], his heirs and assigns, for ever. AND WHEREAS upon the investigation of the title of the said [*obligor*] to the said hereditaments and premises, on behalf of the said [*obligee*], previously to the execution of the said recited indentures, it appeared that a term of one thousand years was created in the said hereditaments by indentures of lease and release, bearing date respectively the 25th and 26th days of March, 1740, the indenture of release being made between [A. B.] of the first part; [C. D.] of the second part; [E. F.] of the third part; and [G. H.] of the fourth part; and which term was thereby limited to the said [G. H.], his executors, administrators, and assigns in mortgage, for securing the sum of 950*l.* and interest, *And* that under or by virtue of divers mesne assignments and assurances, or other acts in the law, and ultimately by an indenture of assignment, bearing date the 29th day of November, 1754, and made between [G. H.] of the first part, [H. I.] of the second part, and [K. L.] of the third part, the unexpired residue of the said term of one thousand years became vested in the said [K. L.], in trust to attend the inheritance. AND WHEREAS the said [*obligee*] required the said [*obligor*] to procure the personal representative of the said [K. L.] to execute an assignment or surrender of the residue of the said term of one thousand years, so far as the same comprised or affected the said hereditaments and premises so purchased by the said [*obligee*] as aforesaid. AND WHEREAS, upon the aforesaid investigation of the said title, it also appeared that [*wife*], the wife of the said [*obligor*], might, in the event of her surviving him, become entitled to dower or thirds out of the said hereditaments and premises so purchased by the said [*obligee*] as aforesaid, or some part or parts thereof. AND WHEREAS

That upon investigation of title it appeared that a term of one thousand years was created in part of the said premises,

by certain indentures;

and became vested in K. L. in trust to attend the inheritance.

That purchaser required an assignment of the same term;

That it appeared on the investigation of the title that vendor's wife might be entitled to dower out of the said premises; That purchaser

BOND TO PROCURE AN ASSIGNMENT OF A TERM, AND RELEASE OF DOWER.

the said [*obligee*] required the said [*obligor*] and [*wife*], his wife, to levy a fine of the said hereditaments and premises, in order to bar and extinguish the dower and thirds of the said [*wife*]. And whereas in answer to the aforesaid requisitions of the said [*obligee*], it was insisted, on the part of the said [*obligor*], that the said term of one thousand years had become merged and extinguished in a certain reversionary term of five hundred years, vested in the said [K. L.], as executor of the will of the said ——, and that the said hereditaments and premises would be protected against the dower of the said [*wife*] by the assignment of certain attendant terms of years, created prior to the inception of her right of dower; but such assurances were not entirely satisfactory to the said [*obligee*]; And in order to induce him to complete the said purchase without insisting on a compliance with the aforesaid requisitions, the said [*obligor*] proposed to enter into a bond or obligation for protecting and indemnifying the said [*obligee*], his heirs, appointees, and assigns, in respect of the said term of one thousand years, and the said dower, in manner hereinafter expressed. Now the condition of the above-written obligation is such, that if at any time within the space of twenty years from the day of the date of the above-written obligation, the counsel in the law of any person or persons to whom the said [*obligee*], his heirs, appointees, or assigns, shall have sold or mortgaged, or shall be in treaty to sell or mortgage the said messuage or tenement, closes, inclosed grounds, hereditaments, and premises, or any part or parts thereof, shall advise or require an assignment or surrender of the said term of one thousand years therein, the said [*obligor*], his heirs, executors, or administrators, shall, at the request in writing of the said [*obligee*], his heirs, appointees, or assigns, but at the costs and charges of the said [*obligor*], his heirs, executors, or administrators, discover or constitute a personal representative to the said [K. L.], in respect of the said term of one thousand years, and furnish the said [*obligee*], his heirs, appointees, or assigns, with the usual evidence of such personal representative, and cause or procure such personal representative to make, do, and execute such assignment

had required a fine from vendor and wife.

That on the part of the vendor it was insisted that the term had become merged;

and that premises were protected from dower.

Agreement for bond of indemnity.

Condition that the obligor, within twenty years, upon the requisition of any future purchaser, &c. shall procure an assignment or surrender of the term.

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or surrender, assignments or surrenders, of the said term of one thousand years, or so much and such parts of the said hereditaments and premises as is or are comprised in the same, as by the said [*obligee*], his heirs, appointees, or assigns, shall be tendered to be made, done, or executed; (such assignment or surrender, assignments or surrenders, to be prepared by and at the costs and charges of the said [*obligee*], his heirs, appointees, or assigns); and if, within the said period of twenty years, the counsel in the law of any such purchaser or mortgagee, or intended purchaser or mortgagee as aforesaid, shall advise or require a release or extinguishment of the dower or thirds of the said [*wife*] in and out of the said hereditaments and premises, the said [*obligor*] shall, on such request as aforesaid, but at the costs and charges in all things of the said [*obligor*], his heirs, executors, or administrators, make, do, and execute, or cause or procure to be made, done, and executed, all acts, deeds, matters, and things, by fine or otherwise, for effectually barring and extinguishing the dower and thirds of the said [*wife*], in the same hereditaments and premises, and all claims and demands in respect thereof; *And* also, if the said [*obligor*], his heirs, executors, or administrators, shall at all times hereafter, until the said term of one thousand years, in so much and such part or parts of the said hereditaments and premises as is or are comprised therein, shall be assigned or surrendered unto or according to the direction of the said [*obligee*], his heirs, appointees, or assigns, and until the said dower or thirds of the said [*wife*] in the same hereditaments and premises shall be released and extinguished for the benefit of the said [*obligee*], his heirs, appointees, or assigns, effectually save harmless and keep indemnified the said [*obligee*], his heirs, appointees, and assigns, and the said hereditaments and premises, and every part thereof, with their appurtenances, from and against all claims and demands, actions, suits, and other proceedings, and all costs, losses, damages, and expenses, which shall be set up, instituted, or prosecuted against him or them, or any of them, or which he or they, or any of them, may be liable to pay, sustain, or incur by reason or in consequence of the non-assignment or non-surrender of the said term of one thou-

And shall do all acts by fine or otherwise for barring the dower of the obligor's wife.

And indemnify the obligee in the meantime in respect of the term and the dower.

sand years, unto or according to the direction of the said [*obligee*], his heirs, appointees, or assigns, or of the non-extinction of the said dower or thirds, or by reason or in consequence of any matter or thing in anywise relating thereto respectively; *Then* the above-written obligation shall be void, and of no effect, or otherwise shall remain in full force and virtue.

BOND TO PROCURE AN ASSIGNMENT OF A TERM, AND RELEASE OF DOWER.

BOND OF INDEMNITY *given by Executor of Obligee of former Bond to the Executor of the Obligor, on* PAYMENT *of* MONEY *secured by a* BOND *which is* LOST *or* MIS-LAID.

BOND OF INDEMNITY ON PAYMENT OF A LOST BOND.

KNOW ALL MEN, &c. *ut ante*, p. 309.

WHEREAS in and by a certain bond or obligation in writing, bearing date on or about the —— day of ——, under the hand and seal of [*obligee's testator*], of &c., the said [*obligee's testator*] became bound unto the [*obligor's testator*], of &c., in the penal sum of £——, with a condition thereunder written, for making the same void, upon payment by the said [*obligee's testator*], his executors or administrators, unto the said [*obligor's testator*], his executors, administrators, or assigns, of the sum of £——, with interest, after the rate of five pounds *per cent. per annum*, at or upon a day or time therein mentioned and since past. Recites the bond which is lost.

AND WHEREAS the said [*obligee's testator*] departed this life on or about the —— day of ——, having first duly made and published his last will and testament in writing, bearing date the —— day of ——, and thereof appointed the said [*obligee*] and [A. B.], of &c., executors, and the same will was, soon after the decease of the said [*obligee's testa-***tor*], duly proved in the proper Ecclesiastical Court, by the said [*obligee*] only, who hath taken upon himself the burthen of the execution thereof. Death of obligee, and representation to him.

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AND WHEREAS the said [*obligor's testator*] departed this life on or about the —— day of ——, having first duly made and published his last Death of obligor, and representation to him.

BOND OF INDEMNITY ON PAYMENT OF A LOST BOND.

will and testament in writing, bearing date the —— day of ——, and thereof appointed the said [*obligor*] sole executor, who hath duly proved the same in the proper Ecclesiastical Court. AND WHEREAS the said principal sum of —— is still due and owing upon or in virtue of the said in part recited bond or obligation, and the said [*obligor*], as the executor of the said [*obligee's testator*], having called upon the said [*obligee*] as the acting executor of the said [A.] [*obligee's testator*], for the payment of the said sum of £——, he the said [*obligee*] hath agreed to pay the same accordingly, in full satisfaction and discharge of all principal and interest monies due and owing upon or by virtue of the said recited bond; but the same bond or obligation having been either lost or mislaid, the said [*obligor*] hath consented that upon such payment being so made to him as aforesaid, he will enter into a bond, conditioned for the indemnity of the said [*obligee*] as hereinafter mentioned. AND WHEREAS in pursuance of the said agreement, the said [*obligee*] hath this day paid to the said [*obligor*] the sum of £——, as he the said [*obligor*] doth hereby acknowledge. NOW THE CONDITION of the above-written bond or obligation is such, that if the said [*obligor*], his heirs, executors, or administrators, or the executors or administrators of the said [*obligor's testator*], shall and do, when and so soon as the said in part recited bond or obligation, of the said —— day of ——, shall be found or discovered, deliver, or cause the same to be delivered unto the said [*obligee*], his executors or administrators, or the executors or administrators of the said [*obligee's testator*] deceased, for the purpose of being cancelled, and for the purpose of thereby effectually discharging the said [*obligee*], his heirs, executors, and administrators, and the heirs, executors, and administrators of the said [*obligee's testator*], deceased, from the payment of all principal and interest monies secured by virtue of the said bond; *And also* if the said *[*obligor*], his heirs, executors, or administrators do and shall from time to time, and at all times hereafter, until the said in part recited bond shall be so delivered up to be cancelled as aforesaid, save and keep harmless and indemnified the said [*obligee*], his heirs, executors, and administrators, and the heirs, executors,

That principal secured by bond is still due, and agreement to pay it on execution of bond of indemnity.

That monies secured by bond have been paid.

Condition to be void on giving up bond if found and indemnifying executors of obligor in the meantime.

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and administrators of the said [*obligee's testator*], and their and every of their lands and tenements, goods and chattels, of, from, and against the said in part recited bond or obligation, and all principal and interest monies thereby secured as aforesaid, and of, from, and against all actions, cause and causes of action, suits, and proceedings whatsoever, both at law and in equity, which shall or may, at any time or times hereafter, be brought, had, commenced, or prosecuted against the said [*obligee*], his heirs, executors, or administrators, or the heirs, executors, or administrators of the said [*obligee's testator*], deceased, and of, from, and against all costs, charges, damages, and expenses, which he or they shall or may pay, bear, suffer, sustain, and be put unto, for or by reason or means or on account of the said bond, or the said principal and interest monies thereby secured, or any act, matter, or thing relating thereto; *Then*, the above-written bond (*a*), &c.

(*a*) A Court of Equity will entertain a suit by the obligee of a lost bond, to enforce payment, on an indemnity being given. *East India Company* v. *Boddam*, 9 Ves. 464.

LEASES.

I. WHO MAY MAKE LEASES, AND TO WHOM.

II. WHAT AMOUNTS TO A LEASE, AS DISTINGUISHED FROM AN AGREEMENT.

III. SOME MATTERS RELATING TO AGREEMENTS; AS TO WHO MAY CLAIM THEIR PERFORMANCE, &c.

IV. RENT; MODE OF ITS RESERVATION, &c.

V. APPORTIONMENT OF RENT—1*st*, IN RESPECT OF THE CORPUS OF THE LANDS; 2*ndly*, IN RESPECT OF TIME.

VI. PROVISOES OR CONDITIONS OF RE-ENTRY, HOW CONSTRUED.—WHERE RELIEVED AGAINST IN EQUITY.—AS TO CONDITIONS NOT TO ASSIGN OR UNDERLET.

VII. COVENANTS:—THEIR CONSTRUCTION; EFFECT OF PARTICULAR COVENANTS; COVENANT BY LESSOR FOR QUIET ENJOYMENT; TO RENEW—BY LESSEE TO REPAIR; PAY TAXES, &c.—WHO BOUND BY, AND WHO MAY TAKE ADVANTAGE OF COVENANTS, AND HEREIN AS TO WHAT COVENANTS RUN WITH THE LAND; EFFECT OR ASSIGNMENT, BANKRUPTCY, &c.—LIABILITY OF EXECUTORS AND ADMINISTRATORS OF LESSEES.—WHERE COVENANTS ARE DEPENDENT, AND WHERE NOT; AND AS TO THE RIGHT OF SET-OFF.

VIII. AS TO INDORSEMENTS ON LEASES.

IX. LEASES, HOW TO BE STAMPED.

X. AS TO TENANCIES FROM YEAR TO YEAR; HOW CREATED AND DETERMINED.—RULES AS TO NOTICE TO QUIT, &c.

I. WHO MAY MAKE LEASES, AND TO WHOM.

1. *As to Leases by Infants and Femes Covertes.*—2. *Lunatics and their Committees.*—3. *Assignees of Bankrupts and Insolvents.*—4. *Executors and Administrators.*—5. *Mortgagors and Mortgagees.*—6. *Copyholders.*—7. *Joint-tenants.*—8. *Husbands seised* Jure Uxoris.—9. *Trustees for Charity.*—10. *As to Leases to Infants and Aliens.*

LEASES BY INFANTS.

1. *Leases by Infants and Femes Covertes.*

A lease by an infant is voidable only, and not void, *Ketsey's case*, Cro. Jac. 320; *Ashfield* v. *Ashfield*, Sir W. Jones, 157: see also 3 M. & S. 481), being presumed to be for his benefit, on account of the rent reserved; though it is not clear that the old rule, which confined this principle to cases in which rent is reserved, (*Lane* v. *Cowper*, Moo. 105, pl. 248; see also 1 Roll. Abr. 729, pl. 50), would now be followed; for as observed by Lord *Mansfield*, there may be most beneficial considerations for a lease, though no rent be reserved. *Zouch* d. *Abbot* v. *Parsons*, 3 Burr. 1806; and see 2 D. & E. 161. The acceptance of rent by an infant after he attains his majority amounts to an affirmation of the lease; *Ashfield* v. *Ashfield*, Sir W. Jones, 157; and a similar effect has been held to arise from expressions used towards the lessee, referring to his future enjoyment, as wishing him joy of it, &c. *Anon.* 4 Leon. 4.

Leases by *femes covertes*, on the other hand, (unless made under a power), are absolutely void, and incapable of confirmation by any such constructive acts. Nothing less than a re-execution by the lessor, after the removal of the disability, will give effect to leases of this kind. See *Goodright* d. *Carter* v. *Strahan*, Cowp. 201.

Leases by *femes covertes*.

2. *By Lunatics and their Committees.*

A lease by a person *non compos mentis*, whether idiot or lunatic, may be avoided by his heirs; and the King may avoid the lease of an idiot after office found. *Beverley's case*, 4 Rep. 123. The same rule has sometimes been inaccurately treated as applying also to lunatics, Com. *Landl. & Ten.* 17, thought there is the obvious distinction, that the incompetency of the former is *a nativitate*, but that of the latter relates to the period expressed in the finding only.

Leases by lunatics.

By stat. 43 Geo. 3, c. 75, s. 4, the committee of a lunatic may make leases under the direction of the Lord Chancellor; and, by sect. 3, he may, under the same authority, exercise powers of leasing vested in the lunatic; and this brings us to a consideration of the subject of leases by persons seised *jure alieno*.

Leases by committees of lunatics.

3. *By Assignees of Bankrupts and Insolvents.*

By the late bankrupt act, (6 Geo. 4, c. 16, sect. 77), all powers vested in any bankrupt, which he might legally execute for his own benefit, except the right of nomination to any vacant ecclesiastical benefice), may be executed by the assignees, for the benefit of the creditors, in such manner as the bankrupt might have executed the same.

Leases by assignees of bankrupts

The late insolvent act (7 Geo. 4, c. 57, s. 22) contains the following power to assignees to grant leases:—"And whereas many persons who may petition the said Court for relief under this act, may be seised and

Leases by assignees of insolvents.

LEASES BY ASSIGNEES OF INSOLVENTS.
7 Geo. 4, c. 57, s. 22.

possessed of lands, tenements, and hereditaments, to hold for the term of their natural lives, with power of granting leases and taking fines, reserving small rents on such estate for one, two, or three lives in possession or reversion, or for some number of years determinable upon lives, or have powers over such real or personal estate, which such persons could execute for their own advantage, and which said powers ought, on such persons petitioning the said Court for relief under this act, to be executed for the benefit of the creditors of such persons: Be it therefore enacted, that, in every such case, all and every the powers of leasing such lands, tenements, and hereditaments, and all other such powers as aforesaid over such real or personal estates, which are or shall be vested in any prisoner who shall petition the said Court for relief under this act; and all trusts or powers whatever vested in such prisoner, or created for his or her use or benefit, which such prisoner might legally execute for his or her own benefit (except the right of nomination to any vacant ecclesiastical benefice), shall be and are hereby vested in the assignee or assignees of the real and personal estate of such prisoner by virtue of this act, so far as such prisoner could, by law, vest such power in any person to whom he or she might lawfully have conveyed such property, to be by such assignee or assignees executed for the benefit of all and every the creditors of such prisoner under the act."

4. *By Executors or Administrators.*

Leases by executors or administrators.

It is frequently laid down, that executors and administrators may demise lands vested in them in that capacity; Bac. Abr. tit. *Leases*, (1); 2 Blackst. 694; Com. *Landl. & Ten.* 44; which is certainly true in one sense, as this power is included in the *jus disponendi* which they possess over all the personal estate of their testator or intestate; see *Holman* v. *Chute*, Cro. Jac. 685; *Baily* v. *Drew*, 2 Lev. 100; *Doe* d. *Hayes* v. *Sturges*, 7 Taunt. 217; and a lease by one of several executors is good; 7 Taunt. 222; but no person can be advised to accept a lease from an executor in trust, of leaseholds which are specifically bequeathed, without the concurrence of the legatee, as the executor may have assented to the bequest, which would vest the legal title in the legatee, and enable him to recover the land by ejectment. *Doe* d. Lord *Saye-and-Sele* v. *Gray*, 3 East, 120; see also *Young* v. *Holmes*, 1 Stra. 70. The same observation, indeed, applies to a *sale* by executors, (though this is not always sufficiently attended to in practice); but as a sale is the proper mode of rendering the property available as assets to pay debts, and an executor may sell for this purpose even *after* assent (subject, however, to the legal title of a purchaser from the legatee without notice), *Chamberlain* v. *Chamberlain*, 1 Ch. Cas. 256, it is evident that a *sale by an executor is supported by many considerations that do not apply to the granting of a lease. In a late case, Lord *Manners* set aside a

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lease which had been taken by a person from an administrator, *with notice that the next of kin called for a sale. Drohan* v. *Drohan,* 2 Ball & B. 185.

LEASES BY EXECUTORS AND ADMINISTRATORS.

It does not follow, however, that a lease, which it is improper in an executor to grant, is therefore void in respect of the lessee. In *Doe* d. *Hayes* v. *Sturges,* 7 Taunt. 217, an executor, who was himself beneficially entitled as legatee for life, with a power of leasing, granted a lease, without reference to the power, for a longer term than was authorized by the power; and it was held, that this lease was to be taken as granted by him in the character of executor, though inconsistent with his duty as such, and not as legatee; and could not, therefore, be avoided by the legatees over. It was contended, that the executor's entry and lease amounted to an assent to the bequest; but *Gibbs,* C. J., said, that the entry of an executor, who was legatee *for life,* was not an assent; *contrà* where he was legatee of the absolute interest.

Destination of rent.

It should be observed, that where an executor or administrator grants a lease, the rent, at his death, devolves upon his own representatives, and does not go to the administrator *de bonis non* of the original testator or intestate; see *Baily* v. *Drew,* 2 Lev. 100; *S. C.* 1 Vent. 275; *Norton* v. *Hervey,* Ib. 259; *Davie* v. *Drury,* 1 Vern. 94; and actions brought by the executor or administrator on the covenants contained in such leases, must be in the *debet* and *detinet, i. e.* in his own right, and not in the representative character.

5. *By Mortgagors and Mortgagees.*

Leases by mortgagees.

Mortgagees also, as persons having the legal estate, may make good leases at law; but such leases are clearly subject to the mortgagee's right of redemption in equity; *Hungerford* v. *Clay,* 9 Mod. 1; for the lessee cannot be in a better situation than the mortgagee himself, *cessante primitivo, cessat derivativus.* For this reason, when a person whose lands are in mortgage grants leases without the concurrence of the mortgagee, (which is too frequently done to avoid a disclosure of the mortgage), the lease is of course void against the mortgagee, who may eject the lessee without notice; *Keech* d. *Warne* v. *Hale,* Doug. 21; *Thunder* d. *Weaver* v. *Belcher,* 1 East, 449; for, as the mortgagor may himself be so ejected, his lessee cannot, upon the principle just referred to, be in a better situation. Such a lease, however, would be good against the mortgagor himself by estoppel; *Maclaughland* v. *Wood,* 1 Roll. Abr. 874, pl. 10; and, if made by indenture, would, under this doctrine, take effect out of the legal estate subsequently reconveyed to the mortgagor. *Vide ante,* p. 224.

Where lands are in mortgage, therefore, the concurrence of both the mortgagor and mortgagee is requisite in the lease; but such leases are subject to this inconvenience, that if the mortgagor enter into the cove-

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nants for quiet enjoyment, &c. (which he usually does), as the legal estate is in the mortgagee, and not in him, such covenants are covenants in gross only, and do not run with the land, so as to bind the grantee of the reversion. And, by parity of reasoning, actions on the covenants entered into by the lessee with the mortgagor can only be brought in the name of the covenantee or his representatives. The lessee's covenants should therefore always be made with the mortgagee, as the owner, for the time being, of the legal estate, and when the debt is paid, and the estate reconveyed to the mortgagor, the right to maintain an action on such covenants (provided, of course, that they run with the land, as to which *vide post*), will pass to the mortgagor, as incident to the reversion. *Webb* v. *Russell*, 3 D. & E. 393; *Stokes* v. *Russell*, Ib. 678. *Vide post.*

6. *By Copyholders.*

Leases by copyholders.

Copyholders cannot demise lands except by special custom, or by licence from the lord, for a longer period than one year, without incurring a forfeiture; see *Melwich* v. *Luter*, 4 Rep. 26; *Luttrel* v. *Weston*, Cro. Jac. 308; *Frosel* v. *Welsh*, Cro. Jac. 403; *Mathews* v. *Whetton*, Cro. Car. 233: see also *Doe* d. *Wood* v. *Morris*, 2 Taunt. 52; *Fenny* d. *Eastham* v. *Child*, 2 M. & S. 255; *Lukin* v. *Nunn*, 11 Ves. 170; and a number of leases for one year, executed at the same time, each to take effect after the determination of the preceding one, is a forfeiture. *Mathews* v. *Whetton*, Cro. Car. 235. If the licence be exceeded, the lease will be void *in toto*. *Jackson* v. *Neal*, Cro. El. 394; *Haddon* v. *Arrowsmith*, Ib. 461; *S. C.* Owen, 73. Thus, if a licence be granted to lease for twenty-one years, a lease for twenty-two years will be void. So, of a lease for years absolute, if the licence were to lease for such period, determinable with the life of a person, unless, from the nature of the copyholder's estate or otherwise, the licence would necessarily have determined with such life. *Worledge* v. *Benbury*, Cro. Jac. 436; *Haddon* v. *Arrowsmith*, *supra*. The lease, however, of course, need not be for the *whole* period specified in the licence. *Goodwin* v. *Longhurst*, Cro. El. 535. The licence only binds the estate of the person who grants it; and if, therefore, it be granted by a person having a limited interest, it is void against the succeeding lord; *Petty* v. *Evans*, 1 Roll. Abr. 511; *Munifas* v. *Baker*, 1 Keb. 25; but the lease granted in such a case does not operate as a forfeiture.

A lease, though void against the lord for want of licence, will be binding on the parties themselves. *Wells* v. *Partridge*, Cro. El. 469; *Ashfield* v. *Ashfield*, Sir W. Jones, 157; *Fareley's case*, Cro. Jac. 36; *Worledge* v. *Benbury*, Ib. 436; *Salisbury* d. *Cooke* v. *Hurd*, Cowp. 481. Where a licence is once granted, the interest demised may, being a common law interest, be assigned without further licence from the lord. *Johnson* v. *Smart*, 1 Roll. Ab. 508, pl. 14.

LEASES BY JOINT-TENANTS.

7. *By Joint-Tenants.*

A lease made by a joint-tenant is binding, in respect of his share, on his companion or companions surviving, though limited to commence at his decease; *Harbin* v. *Barton*, Moor, 395, pl. 514; *S. C.* cit. *nom. Harby* v. *Balton*, Cro. Jac. 91; *Herbin* v. *Birton*, Ib. 417, Dy. 187; *Harbin* v. *Loby*, Noy, 157; but, according to the doctrine of an early case, the rent reserved by a lessor joint-tenant for life ceases at his death, and does not belong to the surviving joint-tenant, Dy. 187; see also Co. Litt. 185. a., as he claims by title paramount.

This case suggests, that, before a joint-tenant leases his share, a transaction which certainly is rather unfrequent, he should sever the tenancy.

A lease for life by a joint-tenant in fee severs the jointure *pro tanto*, the lessee and the other joint-tenant being tenants in common during the continuance of the lease; Co. Litt. 191. b.; but it is said, that an under-lease of a joint-tenant *for years* operates as a complete severance; because, in contemplation of law, "a term for a small number of years is as high an interest as for many more years." Ibid. 192. a.; *Sym's case*, Cro. El. 33. This is not true as a general proposition, (as, for instance, an under-lease by a husband of his wife's term is not a complete disposition,) and it affords a proof of the strong leaning of the Courts in favour of tenancies in common.

8. *By Husbands in right of their Wives.*

Leases by persons seised *jure uxoris*. Stat. 32 Hen. 8, c. 28.

By stat. 32 Hen. 8, c. 28, s. 3, leases made by persons having an estate of inheritance in fee-simple or fee-tail, in right of their wives, or jointly with their wives of an estate of inheritance made either before or after coverture, shall be good; provided the wife be made a party to every lease to be made by her husband, of any manors, lands, and hereditaments, being the inheritance of the wife; and that every such lease be made by indenture, in the name of the husband and wife, and she to seal the same, and that the rent be reserved to the husband and wife, and the heirs of the wife, according to her inheritance.

By this act (which is commonly called the enabling statute, and extends also to leases made by tenants in tail in their own right, *as to which vide ante*, Vol. I. p. 15, n. (*a*),) the lease must be by deed indented—must relate to lands "commonly letten" for twenty years' rent before—must not exceed three lives or twenty-one years from the day of the making—must reserve to the person to whom the reversion shall appertain not less than the rent "most accustomably yielden" for twenty years—must not be without impeachment of waste—and the old leases (if any) must expire or be surrendered within one year from the making of the new lease.

The proviso in the act only extends to cases in which the inherit-

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ance is in the wife solely; and, therefore where she is seised of the inheritance jointly with her husband, she need not be a party. See 1 Butl. Co. Litt. 44. a. n. Whether, in cases which do not fall within the statute, the lease of the husband alone is void against the wife and those claiming under her, or voidable only, and therefore capable of confirmation by her or them, by the acceptance of rent or otherwise, seems to be *vexata quæstio*. It is admitted, on all hands, that if the lease be made by the husband and wife jointly, (though not within the statute), it is voidable only; *Greenwood* v. *Tyber*, Cro. Jac. 563; *Doe* d. *Collins* v. *Weller*, 7 D. & E. 478; and see *Skipwith* v. *Steed*, Cro. El. 769; and it should seem, upon principle, that the non-concurrence of the wife would not vary the rule; since she is, we have seen, incapable of binding herself by contract, and leases by her alone are absolutely void. This view of the question, too, is supported by several authorities; thus, in *Jordan* v. *Wikes*, Cro. Jac. 232, it was held that a lease by the husband alone, seised *jure uxoris*, was voidable only by the wife after his decease, and not absolutely determined on that event. The same doctrine was maintained in *Dixon* v. *Harrison*, Vaughan, 46; and in a late case, Sir *James Mansfield* treated the husband, and him only, as the proper demising party in these cases. *Parry* v. *Hindle*, 2 Taunt. 181; see also 3 Bac. Ab. 305. There are, however, some early authorities the other way; Bro. Ab. title "Acceptance," pl. 6; Ib. tit. "Leases," pl. 24; Cro. Jac. 617; to which may be added *Miller* v. *Maynwaring*, Sir W. Jones, 354, which, though in a book of high authority, has been overlooked in the discussion. Upon these authorities (except the last, which is not cited) the learned Editor of Saunders's Report seems to have inclined to the opinion that the lease in question was absolutely void, 2 Wms's. Saund. 180 b, and that the contrary rule was applicable only to leases for lives. A recent writer has contended in favour of the same conclusion; 1 Rop. Husb. & Wife, 94 (*a*); another has considered it doubtful, Chamb. Landl. & Ten. 70; and a third has assumed the lease to be clearly voidable only. Com. Land. & Ten. 41. In this conflict of authority and opinion, principle seems to be the only guide; and as, for the reasons before assigned, it seems to be impossible to find any solid distinction between a lease by the husband and wife, and by the husband alone, and the conclusion to which this observation leads is supported by a writer, to whom all have agreed to pay deference on this subject, see 3 Bac. Ab. 305, it is conceived that little doubt exists, that the Courts would now hold the lease for years of a husband seised *jure uxoris*, to be voidable only, and not void. It may be observed, that, [*328] though in most of the cases (to which, however, *Miller* *v. *Maynwaring*, Sir W. Jones, 354, is an exception), the question is stated as being,

Whether such leases are void, or voidable only by the wife, &c.

(*a*) There seems, however, to be some confusion in Mr. Roper's arguments.

whether the lease is voidable against the wife surviving the husband, the same principle applies to those claiming under her.

LEASES BY HUSBANDS IN RIGHT OF THEIR WIVES.

The preceding observations apply only to leases *by deed*, for it is clear, upon the authorities, that a parol demise, whether by the husband alone, or by the husband and wife conjointly, of her lands, is absolutely void, and incapable of confirmation. *Walsal* v. *Heath*, Cro. El. 656; see also 2 Taunt. 181.

Parol demise by husband.

Leaseholds, of which the husband is possessed in right of his wife, he may clearly demise, 1 Roll. Ab. 344, such power being included in the *jus disponendi*, which he possesses over her chattels real; and it is no objection to such a lease that it commences at his death. *Anon.* Poph. 4; *Grute* v. *Locroft*, Cro. El. 287. The rent, in such case, belongs to his personal representatives, and not to the wife; Co. Litt. 46. b.; see also 2 Lev. 100; 1 Vent. 259; Poph. 145; though the residue of the term survives to the wife. *Sym's case*, Cro. El. 33. But, if the wife be a party to the lease, and the rent is expressly limited to her and the husband and the survivor, the wife surviving the husband is clearly entitled; and, probably, the same rule would be held to apply, if the wife were a party to the lease, and the reservation were general, and not expressly to her or the husband; for it may be contended, that it was for this purpose alone that the husband could have required her concurrence. If the reservation were expressly to the husband, this would exclude all inference in favour of the wife; and the rent, though she were a party, would undoubtedly belong to the husband.

Under-leases by husband.

11. *Leases by Trustees for Charity.*

Trustees of lands for charitable purposes may, generally, demise lands; but it behoves them, as well as persons taking such leases, to ascertain that the act falls within the scope of their fiducial authority, and is consistent with the beneficial and provident management of the charity estate; for, if otherwise, the Court of Chancery, in the exercise of its tutelary care over the objects of trusts of this description, will set aside the lease at any distance of time. The cases that have occurred do not enable us to state, definitely, under what circumstances this interference of the Court would be exerted, but they afford an elucidation of the principles on which the Court has acted. The ordinary grounds upon which such leases are attempted to be impeached, are, the undue length of the term, the inadequacy of the rent, and the absence of proper provisions protective of the lessor's interest. A husbandry lease of ninety-nine years, at a fixed rent, has been held to be bad on the first of these grounds; *Attorney-General* v. *Owen*, 10 Ves. 555; and see 18 Ves. 326; and a lease containing covenants for perpetual renewal, unsupported by a consideration compensating for such a departure, *with the absolute dominion over the estate, has met with a similar fate. See *Attorney-General* v. *Brooke*, 18 Ves. 320.

Leases by trustees for charity.

—set aside in equity, when.

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LEASES BY TRUSTEES FOR CHARITY.

But it does not necessarily follow, that a lease for three lives, or for a long term determinable on such lives, is a breach of trust, especially if consistent with the custom of the country, to which great attention is always paid. *Attorney-General* v. *Cross*, 3 Mer. 540; and see *Attorney-General* v. *Price*, 3 Atk. 110. And it has been laid down by a high authority, that, "in order to set aside a lease already existing, it is not enough to say that the mode of letting is not the best that might be prescribed; because, upon such a point, there may be a great difference of opinion among the most experienced; *but you must shew that the mode is so positively bad, that no persons meaning to discharge their trust would have resorted to it.* This may be said of leases for a long term of years, absolute, at a stationary rent, because no man of a reasonable degree of providence would so let his own estate." *Per* Sir *W. Grant*, 3 Mer. 540.

Building leases.

Building leases are of course allowed for a longer term than husbandry leases; but even a building lease of 999 years has been set aside as being substantially a sale, and the reversion of no value, the consideration being adequate only to leases of a mere ordinary duration, as 99 years. *Attorney-General* v. *Green*, 6 Ves. 452.

Length of term.

However, there is no rule that trustees may not demise the charity property for a long term, or even alien it absolutely, if such a disposition be shewn to be beneficial to the charity; see 2 Swanst. 302; but extraordinary modes of disposition must be justified by extraordinary circumstances, and the consideration must be shewn to be adequate. It is no objection to a lease that a fine has been taken, "for, in some cases, it may be expedient to take fines, in others to let at the best annual rent." See 3 Mer. 540.

As to inadequacy of rent.

Inadequacy of rent, as already hinted, is a ground for setting aside a lease, whether the term be long or short; Duke's Ch. Us. 43, 67; *Attorney-General* v. Lord *Gower*, 9 Mod. 249; *Attorney-General* v. *Wilson*, 18 Ves. 518; but the inadequacy must be considerable; see *Attorney-General* v. *Cross*, 3 Mer. 541; and the circumstance, that the premises were subsequently underlet by the lessee, at a premium or an advanced rent, (especially if a considerable interval of time elapsed between the relettings), is not conclusive evidence of the rent being inadequate; *Attorney-General* v. *Maywood*, 18 Ves. 335; as the improved value might have been produced by the exertion or expenditure of the lessee; such a circumstance, however, though it admits of, seems to require, explanation. It must not be lost sight of, too, that the security, as well as the amount of the rent, is an object of attention in granting leases, and it may not always be for the substantial and permanent interest of the charity, to take the largest rent that can be obtained; and Lord *Eldon* thought this so important a consideration, as to declare, that, "in such cases, the inadequacy of the rent reserved is less a badge of fraud than

it would be in almost any other instance;" his Lordship, at the same time, denying "that a tenant who has got a lease of a charity estate at too low a rent, with reference to the actual value, is therefore to be turned out, if it appears that he has himself acted fairly and honestly." Ex parte *Skinner*, 2 Mer. 457.

LEASES BY TRUSTEES FOR CHARITY.

Leases have sometimes been set aside without disturbing the under-leases, where the under-lessee had no notice; *Attorney-General* v. *Griffiths*, 13 Ves. 563; and Lord *Eldon* thought that the mere knowledge of the fact, that the original lease was granted by trustees of a charity, was not sufficient to fix under-lessees with notice of the breach of trust committed in granting such lease. *Attorney-General* v. *Backhouse*, 17 Ves. 291. In setting aside a lease granted by trustees of a charity, the Court will order it to be cancelled *in toto*, and will not leave the personal covenants of the lessors in force for the benefit of the lessee. *Attorney-General* v. *Morgan*, 2 Russ. 306.

Under-lessees sometimes not disturbed.

Enough has been said to shew the nature of the considerations which influence the Court in these cases, and the necessity of parties dealing with charity property being prepared to shew that they acted *boná fide;* in which case the Courts will struggle to protect them from the consequences of mere indiscretion, especially after great length of time had elapsed, which, though no absolute bar in these cases, is certainly an obstacle. See *Attorney-General* v. *Warren*, 2 Swanst. 305. One precaution may be suggested, that trustees for a charity should never grant leases without having the lands surveyed and valued by an experienced surveyor, see 3 Mer. 540, especially if the lessee is in any manner related to or connected with the trustees, which is a circumstance always regarded with suspicion. *Ibid.*, and see 2 Mer. 457 (*a*).

10. *To whom Leases may be made.*

Leases to infants are voidable by them at their majority; but the election to avoid the lease must be made within a reasonable time after they attain it. In *Ketsey's case*, Cro. Jac. 320, an action of debt was held to be well brought upon a lease granted to an infant, he being "of full age before the rent day came." It does not appear what period had elapsed since the majority. In the late case of *Holmes* v. *Blogg*, 8 Taunt. 35; *S. C.* 1 J. B. Moore, 466, several learned Judges expressed an opinion, (though the case principally turned upon other points), that an acquiescence of four months precluded an infant from subsequently disaffirming the lease. It was held, in this case, that an infant could not, on avoiding the lease, recover back a sum of money which he had paid as a premium in consideration of it. *Holmes* v. *Blogg*, 2 J. B. Moore, 552.

Leases to infants.

(*a*) As to leases by ecclesiastical persons, *vide ante*, Vol. 1, p. 63, n. (*a*).

LEASES TO INFANTS AND ALIENS.

Leases to aliens.

Aliens are not entitled to hold houses or lands by demise, but such houses or lands will, upon office found, belong to the King. See *Calvin's case*, 7 Rep. 17; 1 Co. Litt. 2. b. The only exception to this rule is in regard to an alien merchant friend, who may have a house for the purposes of trade; but even then, at his death, it will go to the King upon office found, and not to his personal representatives. *Ibid.* It is remarkable, that restrictions so much at variance with the dictates of a sound and enlightened policy, and the modern state of society, should have been allowed to subsist to the present day.

II. WHAT CONSTITUTES A LEASE, AS DISTINGUISHED FROM AN AGREEMENT.

Observations on agreements for leases.

Suggestion.

Where a person agrees to let premises for a term, it is not unusual for the intended lessee to be let into possession on executing an agreement for a lease, either as a temporary arrangement until a lease can be executed, or with a view of avoiding the expense of a lease altogether. But such a course is strongly to be deprecated, on account of the various questions which have arisen in regard to the construction and execution of such agreements, and the unsatisfactory state in which it places the rights and remedies of the respective parties. The tenant has no security for his possession, since he is liable to eviction in an action at law; see *Hamerton* v. *Stead*, 3 B. & C. 478; *S. C.* 5 D. & R. 206; nor has the owner any summary means of enforcing payment of his rent; for it is settled, that, under such an agreement, no distress can be levied, the landlord's only remedy for his rent being an action for use and occupation; *Hegan* v. *Jackson*, 2 Taunt. 148; *Dunk* v. *Hunter*, 5 B. & A. 322, *post*, p. 339; and see 3 Barn. & Cress. 480; unless, indeed, rent has been paid under the agreement; in which case, as the payment of rent creates an actual tenancy from year to year between the parties, the landlord may distrain; *Mann* v. *Lovejoy*, 1 Ryan & Moody, N. P. 355; and he may also maintain an action for breach of any of the stipulations. *Tempest* v. *Rawling*, 13 East, 18; *Doe* d. *Oldershaw* v. *Breach*, 6 Esp. 106; *et vide post.*

Whether instruments operate as leases or as agreements only.

The question, whether informal instruments, bearing the form of agreements, operate as present demises, or as executory contracts only, has been a prolific source of litigation. In order to ascertain the state of the law upon this important point, it will be necessary to give a brief statement of both classes of cases, namely, of those in which instruments of this nature have been held to amount to actual leases, and those in which they have been decided to be agreements only.

One of the first cases of the former class is *Maldon's case*, cit. Cro. El. 33, which arose on a parol lease before the statute of frauds: The words were, "I will you shall have a lease for twenty-one years of my lands in D., paying ten shillings yearly rent; make a lease in writing, and I will

seal it." This was holden to be a valid lease; for the intention of the parties was sufficiently expressed, and the lease to be made was only for further assurance. (Compare this case with *Pleasance* v. *Higham*, 1 Roll. Ab. 848).

WHETHER AN INSTRUMENT IS A LEASE OR AN AGREEMENT ONLY.

Harrington v. *Wise*, Cro. El. 486; *S. C.* cit. Roll. Ab. 847, p. 56. By articles indented and under seal, it was covenanted between the parties, that J. H. "*doth* let" certain lands for a ceriain term, to begin at the feast of St. Michael next following, provided that Wise (the defendant) paid a certain rent. And also, the said parties covenanted that a lease should be made and sealed, according to the effect of these articles, before the feast of All Saints; it was held that this was a good present lease, and what followed only for further assurance.

So, in *Tisdale* v. *Essex*, Hob. 34, a covenant that A. should hold and enjoy certain lands, was held to be a lease, though there was a covenant to make a good and perfect demise of the premises, or security for the quiet enjoyment thereof, as his counsel should think fit. See also *Whitlock* v. *Horton*, Cro. Jac. 91.

The next case is *Baxter* d. *Abrahall* v. *Browne*, Bla. 973. A. and C. entered into an agreement (stamped as such) with B., and thereby agreed, with all convenient speed, to grant a lease to B. of, and *did thereby set and let to him*, all that, &c. to hold for 21 years from Candlemas next, at a rent of 290*l. per annum*, with a proviso that the said lease should be void on non-payment of rent, alienation, &c.; and that such *lease should contain usual covenants on the part of the lessors and lessee*, and certain special covenants therein mentioned, in one of which the expression "this demise," was used; it was contended, that this was only an executory contract, but the Court of Common Pleas (*absente De Grey*, C. J.) held it a good lease *in præsenti*, with an agreement to execute a more formal lease *in futuro*.

Informal instruments held to operate as actual demises.

So, in *Barry* v. *Nugent*, cit. 5 D. & E. 165, where the instrument, which was dated the 10th August, 1751, was in these terms: "Be it remembered, that J. B. (the defendant) hath let, and by these presents *doth* demise, &c. unto R. F. &c., for 21 years, to commence the 5th of May or the 1st of September, which ever first happens after the said J. B. recovers the said lands from M. O. The said R. F. covenanting and agreeing on the foregoing conditions to pay J. B. 110*l.* yearly, and every year, during the said term, &c.; *leases, with power of distress, and clauses for re-entering, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party, as soon as J. B. recovers the said lands from M. O. &c.*" The Court was clearly of opinion, that the articles operated as a present demise, and that the agreement for a more formal lease was only in further assurance. See also *Doe* d. *Warner* v. *Browne*, 8 East, 164.

Poole v. *Bentley*, 12 East, 168; *S. C.* 2 Camp. 186. "Memorandum

WHETHER AN INSTRUMENT IS A LEASE OR AN AGREEMENT ONLY.

of an agreement this 12th of June, 1806, between J. P. and P. B. The said J. P. hereby *agrees to let* unto the said P. B., and the said P. B. *agrees to take* of the said J. P. all that &c., for the term of sixty-one years, from Lady-day next, at the yearly rent of 120*l.*, free &c. And that for, and in consideration of, a lease to be granted by the said J. P. for the said term of years, the said P. B. agrees, within the space of four years from the date hereof, to expend and lay out in five or more houses of &c., 2000*l.*; and the said J. P. agrees to *grant a lease or leases of the said land and premises, as soon as the said five houses are covered in, and P. B. agrees to take such lease or leases, and to execute a counterpart or counterparts thereof.* This agreement to be considered binding till one fully prepared can be produced." This was written on an agreement stamp, and signed by both parties. The Court of King's Bench held that it amounted to an actual lease. Lord *Ellenborough* said, "The rule to be collected from all the cases is, that the intention of the parties, as declared by the words of the instrument, must govern the construction; and here their intention appears to have been, that the tenant, who was to expend so much capital upon the premises within the first four years of the term, should have a present legal interest in the term, which was to be binding upon both parties; though, when a certain progress was made in the buildings, a more formal lease or leases, in which, perhaps, the premises might be more particularly described for the convenience of under-letting or assigning, might be executed."

Informal instruments held to operate as actual demises.

Doe d. *Walker* v. *Groves*, 15 East, 244, was an action of ejectment brought by a landlord against his tenant; and the question was, whether the following instrument, under which the defendant entered, and which was stamped as an agreement only, operated as such, or was a present demise. "Agreement made this 7th day of March, 1798, between T. W. of the one part, and E. G. of the other; the said T. W. doth hereby *agree to let, and also, upon demand, to execute unto the said E. G. a lease* of the farm, &c., as the same is now in the occupation of the said T. W. And the said E. G. doth hereby *agree to take*, and, upon demand, to *execute a counterpart of a lease* of the said farm: to hold the same from the 5th of April, 1798, for the term of 15 years, under the yearly rent of 147*l.*, to be paid half yearly, on the 5th of April and 10th of October; which said lease is to contain the usual covenants, and an agreement for re-entry, in case of non-payment of the rent or non-performance of covenants, and also the further covenants, &c. That this agreement shall be binding until the said lease is made and executed. And lastly, that the said T. W. shall this present season properly cultivate, and, at his own expense, sow down ten acres of tillage land, &c." The landlord recovered a verdict, on the ground that this paper amounted to an agreement only. A rule for setting aside the verdict having been obtained, the Court made the rule absolute, being of opinion that the paper operated as

a present demise. Lord *Ellenborough* observed—"If, by the terms of this agreement, it had been provided that there should be no entry until a lease was executed (*a*), I should have had considerable doubts; but, as the case stands, it does appear to me that the instrument must be considered as a present lease from the 5th of April, 1798; from that period it has the operation of a demise, not depending upon the contingency of the party's granting a future lease, which was a stipulation only for the better security of the lessee. It falls, therefore, within the case of *Poole* v. *Bentley*. And in *Barry* v. *Nugent*, the Court thought, notwithstanding it was agreed that leases with the usual clauses were to be drawn, that such a stipulation did not affect the words of demise. Here the lessee might never have the benefit of an executed lease. In the interim, therefore, this was an agreement to operate as a present demise, commencing immediately from the 5th of April, though a more formal lease was afterwards to be granted. The cases run upon extremely nice distinctions; but I think this must be taken as a lease within the authorities."

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The last of this class of cases is *Pinero* v. *Judson*, 3 Moore & Payne, 497, where, by an instrument intitled a memorandum of agreement between A., of the one part, and B. and C. of the other part, A. agreed to grant, seal, and execute unto B. and C., a lease of certain premises, to hold from a day then past, for a certain term, at a specified rent, and under and subject to covenants on the part of B. and C. to pay the rent, &c., the said lease also to contain a covenant for quiet enjoyment by A. B. and C. agreed to accept the lease and execute a counterpart, to pay the expense thereof, and in the mean time, until the lease should be executed, to pay to A. the yearly rent, to keep the premises in complete repair, painting them every third year, &c. And they further agreed to put the premises into repair by a certain day; and it was agreed, that if B. and C. should not put the premises in repair, or if, at any time before the lease was executed, any quarterly payments of the yearly rent should be in arrear, and no sufficient distress, it should be lawful for A. to re-enter, and the agreement should be void. No farther lease was executed; and B. and C., considering themselves as tenants from year to year, gave notice to quit; which A. disregarded, and at the end of the term brought an action against them for use and occupation, treating the instrument as a present demise; and which the Court was of opinion was its true construction. L. C. J. *Tindal* said.—"The law has long since been settled, that, when the words of an instrument of this description are doubtful or ambiguous upon the face of it, the Court must endeavour to ascertain the intention of the parties at the time it was entered into; and this must be collected from the terms of the whole of the instrument; and if we see a paramount intent, that it shall operate as a present lease or de-

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(*a*) But see *Goodtitle* v. *Way*, *infra*, p. 335.

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mise, it must be so construed. Now, it appears to me that it was clearly the intention of the parties, that the instrument in question should operate as a lease; and although it commences with the mention of the execution of a future formal lease, yet it states that the tenancy had commenced at a day previously to the signing and execution of the instrument, *viz.* on the 25th March, then last past. If the only stipulation was for a future lease, the instrument might perhaps only operate as an agreement; but until a lease was prepared and executed, the defendants were to be placed in the same situation as if it had been actually executed. That appears to me to remove all doubt upon the subject. The defendants, as tenants, agreed to accept a lease of the premises upon certain terms expressed in the agreement, and to execute a counterpart immediately upon the execution of the lease, and, in the meantime, and until such lease should be made and executed, to pay the plaintiff, as landlord, the rent of 80*l.*, in manner before specified in the agreement, and to hold the premises subject to the covenants above mentioned. Some of those covenants appear to me to be wholly inconsistent with a yearly tenancy; one of them was, that the defendants, as tenants, should paint the premises every third year; and another, to put them in repair at their own expense, and complete them before April then next ensuing, (the tenancy having commenced at Lady-day preceding), and to keep them in proper tenantable repair. These covenants would be most unreasonable, if the tenants were to occupy the premises from year to year only, but reasonable and usual for a tenant who takes for a term; and, although the parties might have meant that a formal lease should be executed, yet, in the mean time, and until it was prepared, the tenants were to hold the premises on the same terms as if it had been actually executed."

Informal instruments held to be agreements only

The same principle, namely, that an agreement to let on lease, which lease was to contain certain stipulations, *the parties agreeing to observe the stipulations in the meantime until the lease was granted,* operated as an actual demise, was recognised in the late case of *Wilson* v. *Chisholm*, 4 Carr. & Payne, 474.

So far as to cases in which informal instruments of this kind have been held to amount to actual leases. We now proceed to the second class of cases to be considered, namely, those in which they have been held to operate as executory agreements only. One of the first of these is *Sturgeon* v. *Painter*, Noy, 128, where this construction obtained, notwithstanding that there were clear words of present demise. The terms of the instrument were as follow: "Articles agreed upon, &c. *Imprimis*, A. *doth demise* his close to S. to have it for forty years, and rent reserved, with clause of distress, &c. In witness whereof," &c. And a memorandum was added, that these articles were to be ordered by counsel of both parties, according to due form of law. It was ruled in an action of ejectment, that this was not a sufficient lease.

Goodtitle d. *Estwick* v. *Way*, 1 D. & E. 735. The instrument, which

was not under seal, and was written on unstamped paper, (and the date of which does not appear), imported to be articles of agreement between Lord A. and W., by which Lord A., in consideration of a sum of money to be paid by W., sold him the goods in his house at R. The agreement proceeded as follows: "And further, the said Earl of A. doth hereby agree to let, and the said W. agrees to rent and take for the term of seven, fourteen or twenty-one years, if the said Earl should so long live, at and for the yearly rent of 1400*l.* a-year, to be paid half yearly, (the said Earl to pay or allow all manner of tithes and taxes) all his estate at R. *It is agreed that the said W. shall enter on all the *said premises immediately,* [*335] but not commence payment of rent till Lady-day next. It is further agreed, that *leases with the usual covenants shall be made and executed by the parties on or before Michaelmas next.* The Court of King's Bench, upon a motion for a new trial, decided that this was not a lease, but merely an agreement.

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Doe d. *Coore* v. *Clare*, 2 D. & E. 739. A. by a paper writing *agreed* that in case he should become entitled to certain copyhold premises at the death of S., who held the same for life, he *would* demise the same to C. To hold the same from the death of S. for twenty-one years; and promised to procure a licence to let the said premises. Lord *Kenyon*, at the tiral, was of opinion that even this amounted to a lease, there being words of present demise; but upon a motion for a new trial, the Court, after reviewing the authorities, thought that his Lordship had been mistaken on two grounds: *first*, because, if there had been a lease, a forfeiture would have been incurred; and *secondly*, because the stamp was adapted to an agreement, and not a lease.

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Perhaps the first of these grounds is not very solid, for it is not more improbable, that parties should do an act which would amount to a forfeiture, than that they should agree to do it; at all events, the last is clearly untenable, for the circumstance of the parties having stamped, or otherwise dealt with the instrument as an agreement, ought not to vary the construction. See *Morgan* d. *Dowding* v. *Bissell*, 3 Taunt. 71. It is difficult to conceive how Lord *Kenyon* could, for an instant, have treated the agreement in *Doe* v. *Clare* as a lease. It contained no words of demise, was incapable, from the nature of the lessor's interest, of conferring an immediate right to the possession, and through every clause of it evidently contemplated a future lease. To say that such a paper was a lease, was in effect to declare that no agreement for a lease could be made.

Roe d. *Jackson* v. *Ashburner*, 5 D. & E. 163. "March 4th, 1783. Articles of agreement between T. S. and D. T., entered into in regard to his fulling mills, &c. That the said mills, &c. *he shall enjoy, and I engage to give him a lease* in, for the term of thirty-one years from Whitsuntide, 1784, at the clear yearly rent of 110*l.*, to be paid by two equal payments, at Martinmas and Whitsuntide following. And that I will purchase one yard in breadth, to be laid to the race, &c. and if it be

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bought, and the purchase is more than 200*l. per* acre, he the said D. T. to pay more than it costs beyond that rate. And (after providing for a certain alteration), that D., on his part, engages to keep the mills, wear, and every other matter in repair, he having at all times the privilege of the roads, to make what repairs may be wanted. That he the said T. engages not to be concerned, directly or indirectly, in any other mill in," &c. This was held to be an agreement only, and not a lease *in præsenti*. Lord *Kenyon* thought, that though the words "he shall enjoy," standing alone, would have operated as a *demise, they were qualified by the subsequent words engaging to give a future lease.

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Doe d. *Bromfield* v. *Smith*, 6 East, 530. In this case the paper was in the following terms: "3d March, 1778. Agreed this day to let to Mr. S. my house, situate in W., at the yearly rent of thirty guineas, he paying the taxes, also an inclosure called G. at the yearly rent of 7*l*. The above agreement to continue during my life, supposing it to be occupied by himself, or a tenant agreeable to me. *A clause to be added in the lease*, to give my son a power to take the house for himself if he chooses, when he comes of age." The Court was of opinion that the words importing that something ulterior the agreement was to be done by way of regular lease, shewed the intention of the parties, that the writing should only operate as an agreement for a lease, and not as a lease itself.

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Hegan v. *Johnson*, 2 Taunt. 148. A. agreed "that he would, by indenture, demise to B. a house for fourteen years, from the 25th day of December then last past, at the yearly rent of 40*l*., payable quarterly; but if B. should pay A. the sum of 40*l*. before the expiration of the first quarter, which would be at Lady-day then next, in that case the rent should be reduced to the rate of 33*l. per annum*, payable quarterly." The tenant entered under this agreement; the landlord distrained for three quarters' rent, the tenant replevied, and it was held that this agreement was no demise, and did not support the cognizance. It was then contended, that although this paper would not have proved a demise, yet it was evidence of the terms on which a demise subsisted, and that the occupier, by this agreement, became tenant from year to year, so that the landlord might distrain; but the Court held that the agreement had no such operation; for if, at any time before the end of the first year, a lease had been tendered to the occupier, and he had refused to execute it, the lessor might have ejected him without any notice to quit; and if he had executed it, he would thenceforward have held, not under the supposed demise, but under the lease.

So, in *Browne* v. *Warner*, 14 Ves. 156, where the paper was intitled—"Memorandum of agreement, &c." and proceeded, "A. *doth* agree to let," and B. "*doth* agree to take" certain premises at 40*l. per annum*, clear rent, to be paid quarterly. And it was further agreed, that A. should not raise the rent nor turn out B., so long as the rent was duly paid quarterly, and he did not expose to sale any article that should be inju-

rious to A. in his business. And it was further agreed, that, in case of removal, B. should be at liberty to receive the aforesaid sum of 40*l.* of the next tenant A. should accept. Lord *Eldon* treated this as an agreement for a lease only, observing "that though the style of the paper, as, the memorandum of an agreement, and the phrase "agree to let," will not exclude the construction of an actual demise in some cases; yet, if the whole imported rather an intention to do a future act, than a thing that *is done, those words may be construed as not amounting to an actual letting and taking. The Court of King's Bench had previously come to the same conclusion upon the instrument. See *Browne* v. *Warner*, 8 East, 16. Indeed, the contrary was hardly attempted to be maintained; the great point of dispute being, whether, upon the indefinite terms of the agreement, the intended lessee was entitled to a lease for life, or from year to year only. It was not necessary for the Court of King's Bench to decide this point, and Lord *Eldon* refused to do so upon demurrer; but his Lordship threw out an observation which is material to our present purpose, namely, that if an interest *for life* was intended, the fact, that the paper was inoperative as an actual demise, (as leases for life can be made by deed (*a*) only), formed a strong ground for construing it as an agreement only.

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The next case is *Tempest* v. *Rawling*, 13 East, 18, which was an action by landlord against the tenant for mismangement of a farm. The instrument produced, which was stamped as an agreement only, was in these words: "Conditions of letting the four farms after-mentioned, &c." (which were offered in so many lots), and then it proceeded, "the term to be from year to year: The lands to be entered upon on the 3rd of February, 1808, and the housing on the 12th of May, and six months notice to quit to be given." Then, after stating certain regulations to be observed by the tenant, it proceeded, "*a lease to be made upon these conditions with all usual covenants.*" At the foot of the paper was written, "I agree to take Lot one (the premises in question) at the rent of, &c. subject to the covenants." This was signed by the defendant, and dated the 24th of November, 1807. Lord *Ellenborough* said, "This is nothing more than an agreement for a lease, which was to be made thereafter, and time was given to prepare it before the term was to commence. In *Poole* v. *Bentley*, *ante*, p. 333, (which had been relied on for the contrary construction), the tenant was to have immediate possession, and to lay out money in building, and the rent was to commence immediately; here, there was no immediate occupation to be taken by the tenant."

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(*a*) *Sed quære.* Before the statute of frauds, estates of freehold, and even of inheritance, might have been created by parol, and that statute merely rendered a *writing* necessary. By "deed," his Lordship must be understood to mean an *instrument capable of creating a freehold interest*, which this paper clearly was not.

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Morgan d. *Dowding* v. *Bissell*, 3 Taunt. 65. The agreement, which was dated October 2, 1806, was as follows: "Mr. Dowding agrees to let to Mr. Bissell all that farm in the parish of Cradley, (except three pieces of land, containing &c., and except all trees, &c.), to hold from the 29th of September last for the term of twenty-one years, determinable at *the end of the first fourteen years, on twelve months' notice, at the yearly rent of 226*l.*, payable on the 25th of January, yearly; and at and under all other usual and customary covenants and agreements, as between landlords and tenants, where the premises are situate. Mr. Bissell to spend six waggon-loads of Worcester dung annually, over and above what is made upon the land; to remove the stocks in Pontix Pitch (except the pear trees), into or round the piece of land called Old Cradley, at his own expense. Mr. Dowding to allow 26*l.* a-year for manure, ten loads to be spent annually on the meadow land; to erect a cowshed, pitch the stable, and pale the fold-yard; to put new gates where wanting; the fold-yard to be completed in a month from this time; the same to be kept in repair by Mr. Bissell, being allowed timber in the rough; to have the use of limestone, in the coppice adjoining, for the farm, and for sale one hundred and fifty loads; to allow a proportionate part of the rent, from Michaelmas to Christmas; to put and keep the tiling in repair during the term; to allow a proportionate part of the rent for the three pieces of land above excepted. Witness our hands, 1st of October, 1806, John Dowding, Joseph Bissell." This instrument was originally written on unstamped paper, but was afterwards stamped both as a lease and as an agreement. An action of ejectment, brought by the lessor against the lessee, raised the question, whether it operated as an agreement or a present demise. At the trial, Mr. Justice *Lawrence* observed, that "he saw nothing in this paper that looked to a future lease, and what passed afterwards was not material. *Where there is an instrument, by which it appears that one party is to give possession and the other to take it, that is a lease, unless it can be collected from the instrument itself, that it is an agreement only for a lease to be afterwards made.*" On a motion to set aside the plaintiff's verdict, the Court held the instrument to be executory. Sir *James Mansfield*, C. J.—"This sort of question, which we are now about to decide, is an extremely unpleasant one. The good sense is with the modern cases. When the party enters into that, which, on the face of it, appears to be an agreement, though there are words of present demise (*a*), yet, if you collect on the face of the instrument the intent of the parties to give a future lease, it shall be an agreement only. It is true, as hath been said, that in most of the cases there have been positive agreements for a future lease, and that there is none

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(*a*) See *Barry* v. *Nugent*, cit. 5 D. & E. 165, *ante*, p. 332; and see observation, *post*, p. 341.

such here; but the real question is, what did these parties intend? Now, the plaintiff's lessor agrees to let to the defendant (not using the strong words which are in *Barry* v. *Nugent*, and other cases,) all that farm, except, &c. And he goes on to make particular provisions; and then he says, at the yearly rent of 226*l.*, 'and under all usual covenants and agreements, as between landlord and tenant, where the premises are si-*tuate (*a*).' This is not the language in which a lawyer would introduce into a lease the technical covenant for further assurance, but contemplates the entire making of an original lease. Then follows a partial apportionment of the rent from Michaelmas to Christmas, which I do not understand, for the date is the second of October; but then comes an apportionment of the rent for the excepted premises. Now, do these words imply or not, that one of the parties should grant, and the other accept, a further lease. Would any landlord or tenant of common sense enter on a term for twenty-one years, without ascertaining what were the terms on the one side and the other, by which they were to be bound for twenty-one years, and what was to be the rent apportioned for the excepted premises. The landlord thinks he is injured by a breach of covenant, and brings an action; and then it is to be gone into what are the proper covenants, according to the custom of the country. In like manner they must go to a jury, to see what is the rent of the excepted lands. Does not, then, this agreement clearly imply, that the parties meant to have a lease? The landlord did not mean that the tenant should hold, nor did the tenant mean that the landlord should have the rent, without previously ascertaining what was the rent, and what were the terms on which he should hold. We must, therefore, presume that they meant to have a further lease; and then, according to the doctrine of the modern cases, no present interest is conveyed under this instrument; and it would be a very wise rule, that, wherever one person is about to grant, and another to take a lease, until the lease was actually executed, no interest at law should pass. As to the question, what are usual covenants, it is an endless source of litigation. I have known parties long hung up at an inquiry before a Master of Chancery, what are the usual covenants; *and it is the extreme of folly, either to give or to take possession under such an agreement, till a lease is executed;* but the covenience of parties sometimes requires it."

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The next case is *Dunk* v. *Hunter*, 5 B. & A. 322, where an action of replevin for distraining the plaintiff's goods raised the question, whether the following paper was a present demise, or an agreement only. It was

(*a*) See *Baxter* d. *Abrahall* v. *Browne*, Blackst. 973, *ante*, p. 332, where, however, the whole context of the instrument pointed more strongly to a present demise than in *Bissell* v. *Morgan*, the case in the text.

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entered into the 19th March, 1819. "Memorandum of an agreement between Mrs. A. H., of S., and D. D., of B.; Mrs. A. H. agrees to let on lease, with purchasing clause, for the term of twenty-one years, all that house and premises, St. James's Street, present tenant Thomas Lawler; entering on the said premises by D. D. any time on or before the 11th day of February, 1820, at the net clear rent of 63*l. per* year; and [*340] to keep all premises in as good repair as when taken to, *(reasonable wear allowed), paying on entry 50*l.* in ready cash, and the rent payable quarterly. The term for seven, fourteen, or twenty-one years, which term Mr. D. D. is to give one clear year's notice, before the expiration of either of the above term of years, if he intends to leave; if purchases before the expiration of the above term by D. D., he is to pay on purchase 1000 guineas." The plaintiff, under this agreement, paid the sum of 50*l.* on the 10th February, 1820, but, in consequence, as it was said, of some arrangement between him and the former tenant, he did not enter into the occupation of the premises till the 10th April following. In the March preceding, an application was made, and a lease tendered to the defendant (the landlady) to execute; but she declined to do so, saying, she had found that she could not grant one. No rent had been paid by the plaintiff. The Court were of opinion that this was an agreement for a lease only, and consequently that the distress was unlawful.

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In *Colley* v. *Stretton*, 3 Dowl. & Ryl. 522, and *Hamerton* v. *Stead*, 3 Barn. & Cress. 478, *S. C.* 5 Dowl. & Ryl. 206, it was faintly attempted to be maintained, that an agreement to let premises upon certain terms, and grant a lease, operated as a demise; but the Court treated it as quite clear, that no legal interest passed by it.

The last case to be noticed is *Clayton* v. *Burtenshaw*, 5 Barn. & Cres. 41; *S. C.* 7 Dowl. & Ryl. 800. The action was brought on the following deed, which was under seal: "Memorandum of agreement made and entered into this 25th day of September, 1815; *viz.* that is to say, we, the undersigned H. R. J. and C. B., in the county of S., yeomen, do agree with Messrs. T. C., H. B., and J. B., executors to the estate of the late G. V., deceased, to take and hire of the said executors, for our son and nephew R. B., all that house, shop, warehouse, and all appurtenances hereunto belonging, situated, lying, and being in the town and parish of H., in the county of S. aforesaid, at the yearly rent of 35*l. per annum*, we paying all taxes, except the property tax. It is also by these presents further agreed, that we will take all the stock in trade of grocery, linen-drapery, and haberdashery; and also all the fixtures and utensils in the shop and warehouse, and such part of the household furniture as we, the undersigned, shall think necessary for the use of our son and nephew R. B., at a fair valuation, on the 11th day of October next coming; and for the consideration and amount of such stock, utensils, and household furniture, we do agree to pay,

or cause to be paid, the sum of 1000*l.*, in the manner hereinafter mentioned, that is to say," &c. In an action of covenant on this instrument, it appeared to be stamped with a lease stamp of 1*l.* 10*s.* and not with a deed stamp of 1*l.* 15*s.*, which, if it were not a lease, was requisite. Mr. Baron *Graham*, at *Nisi Prius*, held that the instrument was not a lease, and, therefore, could not be received in evidence; and of that opinion was the Court. On a motion for a new trial, Mr. Justice *Bayley* observed, "looking at the instrument itself, I am per- *suaded great injustice might be done by holding it to be a lease. Was [*341] it the intention of the parties that it should operate as a present demise? I cannot persuade myself that the defendants ever consented so to consider it. *Non constat when the interest was to commence, nor how long it was to continue.* Now, it was hardly to be supposed that a man would agree to buy the fixtures and stock in trade on the premises, without having some certainty as to the length of time during which he would have a right to occupy the premises, and carry on his business there. It has been said, that the interest would commence from the time of the execution of the instrument; but it is clear, the property in the goods could not vest at that time." Mr. Justice *Holroyd*.—"The instrument does not contain any words binding the party who was to demise." Mr. Justice *Littledale* thought the nonsuit was right, whether the instrument was a lease or an agreement, the instrument containing a contract *by deed* for the sale of goods. The Court were about to discharge the rule; but as the instrument had been impressed with a lease stamp, by the advice of the officers of the stamp-office, the rule was made absolute upon payment of costs as between attorney and client.

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A comparison of these two classes of cases will serve to shew the impossibility of reconciling all the decisions upon the subject. The sound and sensible rule seems to be, that where the paper is executory in its terms, and contains no words of present demise, particularly where an intention to execute a lease is expressed, it is to be construed as an agreement only; and to this rule the later Judges have certainly inclined. Much of the discrepancy in the determinations is produced by the cases of *Poole* v. *Bentley*, and *Doe* v. *Groves*, in which, it will be remembered, Lord *Ellenborough* and the rest of the Court of King's Bench held, that an instrument by which one party agreed to let, and the other to take premises on certain terms, and grant and accept a lease, operated as an actual lease, with an agreement to execute a future lease, by way of further assurance. The *professed* principle, indeed, of these cases, is not at variance with the general current of authorities; for his Lordship assumed that the instruments contained words of present demise; and if such had been the fact, the case of *Barry* v. *Nugent* would clearly have authorized his Lordship's conclusion. But the assumption seems to be wholly unfounded; no operative words of demise can be collected from

General conclusion from the cases.

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the instrument; and, therefore, the cases may be considered as overruled by the later determinations, which seem to support the doctrine, as ably laid down by Sir *James Mansfield*, in *Morgan* v. *Bissell*, *ante*, p. 337, except, perhaps, so far as the learned Chief Justice asserted, that words of present demise might be controlled by an agreement to grant a future lease; for it is difficult to carry the rule to this extent, consistently with principle or the authorities, particularly with the case of *Barry* v. *Nugent*, *ante*, p. 332, just noticed.

Since the publication of the first edition of this work, containing the preceding observations, the case of *Pinero* v. *Judson*, *ante*, p. 334, has been decided. In that case, an instrument was held to operate as an actual demise, though it contained an agreement for a future lease, and there were no words of present demise. Several of the clauses, however, shewed that the parties contemplated the existence of the relation of landlord and tenant before the lease was granted. This was particularly evinced by the stipulation empowering the lessor to enter before the granting of the lease, if the rent was in arrear, and there was no sufficient distress; because a distress could not have been made unless a tenancy were created; and the holding under the instrument, if it were executory only, would not give a right to distrain, until the payment of rent, which, it will be presently seen, has the effect of creating a tenancy from year to year between the parties.

[342] III. SOME MATTERS RELATING TO AGREEMENTS; AS TO WHO MAY CLAIM THEIR PERFORMANCE, &c.

1. *What Conduct on the part of the intended Lessee precludes his Right to a Specific Performance. Effect of Acts which would have amounted to a Breach of the Conditions or Covenants.—2. Laches, Misrepresentation, Insolvency.—3. Whether a Contract for a Lease be assignable.*

Agreements for leases.

Numerous questions have arisen in regard to the execution of agreements for leases. One of these has already been fully treated of in a former part of this work. (*Vide ante*, Vol. I. p. 23, *et seq.*) It may be useful briefly to notice a few of the others.

1. *What Conduct on the part of a Person with whom an Agreement for a Lease has been entered into, will preclude his Right to a Specific Performance, in a Court of Equity.*

Whether enforced, where the tenant has done an act which would have been a forfeiture;

This has long been *vexata quæstio*. It is clear, that if the intended lessee have done acts, which, had the lease been granted, would have amounted to a forfeiture, the Court will not decree performance, (*Weatherall* v. *Gearing*, 12 Ves. 504; *Gourlay* v. Duke of *Somerset*, 1 Ves. & Bea. 72; see also 18 Ves. 63), unless the landlord has, by the acceptance of rent subsequently due, or by any other act, waived the forfeiture;

Gourlay v. Duke of *Somerset*, 1 Ves. & Bea. 68; and Lord *Eldon* seems to have thought that gross breaches of covenant, especially where they were of a nature not to admit of compensation in damages, might form a ground for refusing performance, even though, upon the terms of the agreement, no right of re-entry would have accrued, and notwithstanding the subsequent acceptance of rent by the landlord. *Boardman* v. *Mostyn*, 6 Ves. 472; and see 1 Ves. & Bea. 73.

or has broken the covenants.

Indeed, it should here be noticed as a distinction useful to be kept in view, that the acceptance of rent, or such other act on the part of the landlord, does not prejudice his claim under a covenant previously broken, though it prevents him from availing himself of a forfeiture previously incurred; for this obvious reason, that the act only amounts to a recognition of the subsisting relation of landlord and tenant, and such recognition is perfectly consistent with an intention to seek compensation for the violation of the covenant, but is *not* consistent with an intention to enter for the forfeiture, and thereby determine the tenancy. From losing sight of this material distinction, some discrepancy appears in the positions of a respectable writer on this subject; see Chamb. *Landlord & Tenant*, 235, 236.

Effect of subsequent acceptance of rent.

But the breach of condition or covenant, (assuming the latter to be sufficient), must be clearly made out, to induce the Court to withhold specific performance; "for the question, whether a covenant has been *broken or not, *if there is any doubt of the fact*, is more proper for the determination of a Court of law and a Jury;" and the Court will decree performance, leaving the complaining party, if he can, to avail himself of any breach of covenant at law. See *Jones* v. *Jones*, 12 Ves. 186.

Breach of covenant, &c. must be clearly proved.

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Injuries accruing to the landlord by the acts of the tenant, but which do not amount to a breach of covenant, form no ground for refusing execution of the contract; and therefore, where the tenant, in an agreement for a building lease, had built a brewhouse, which deteriorated the value of the landlord's property in the neighbourhood, the Court decreed performance, there being no covenant not to build a brewhouse; the Vice-Chancellor observing, "that if it became a nuisance, the defendant had a remedy at law." *Gordon* v. *Smart*, 1 Sim. & Stu. 66.

As to injuries not within the agreement.

2. *Effect of Laches, Misrepresentation, Insolvency.*

Laches, and delay also, on the part of the person to whom the lease is contracted to be granted, may afford a valid reason for refusing to enforce the contract; as where the bill was not filed until more than two years after the defendant had given notice to the plaintiff of his intention not to perform the contract, on account of the latter not having fulfilled it on his part. *Heapley* v. *Hill*, 2 Sim. & Stu. 29.

Effect of laches.

Whether the Court will decree a specific performance after the term for which the lease was to be granted has expired, in order to enable one of the parties to maintain an action for breach of covenant, is a point

Whether the Court will decree performance after the term has ceased.

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that remains in some doubt. The negative was held in two cases, *Western* v. *Perrin*, 3 Ves. & Bea. 197; *S. C. nom. Weston* v. *Pimm*, 1 Swanst. 225, n.; *Nesbitt* v. *Meyer*, 1 Swanst. 223; but neither of them involved the general principle; for, in the first, it was not clear that the covenant in question had been broken; and in the last, the damage arising from the breach was very trivial, (only 3*l.*); and the Master of the Rolls (Sir *T. Plumer*) intimated that he was not to be "understood as holding that there cannot be a case in which it may be fitting for a Court of Equity to decree the execution of a lease after the expiration of the term, a case of important rights and losses arising in the interval, and where a strong necessity is presented to the Court."

Effect of gross misrepresentation.

Gross mis-representation on the part of the intended lessee, at the time of entering into the agreement, has also been made a ground for refusing specific performance.

Thus, in *Willingham* v. *Joyce*, 3 Ves. 168, it appeared that, upon the application of the plaintiff, the defendants said they would not let their house to any one who would let lodgings. He said he did not wish that, as he was an attorney, and wanted it for himself; that he had lived nine years in the house under A., the former owner, and only quitted [*314] it because she wished to live in it herself; that he paid his rent *quarterly, and that they would be satisfied with the character A. would give him, but they must call that eventng, as he was to give an answer that evening about another house, and was going out of town next morning. Notwithstanding this representation, it appeared that he had been tenant to A. a very little time, and had been distrained upon for rent and taxes; nor would he quit her house till she consented to refund 5*l.* he had paid her, and accept his notes for the rent due, which notes were never paid. Upon going away he also had committed wanton damage, and behaved very ill. A. gave the plaintiff a character to the defendants in order to get rid of him, but afterwards told them the truth. These particulars were proved by her. It was also proved that the plaintiff let lodgings; and the defendants, upon receiving the information, offered to give up the rent if he would quit the house: that he was a bankrupt in 1789, and obtained his certificate in the same year; and a letter was proved to have been written by him, dated June, 1796, (the year the cause was heard), in which he acknowledged that it was necessary he should be from home till his affairs were settled. There was also a summons to convene his creditors. It was contended, for the defendants, that the plaintiff was not a proper person to have a performance. The parties came to a compromise; but the Master of the Rolls desired it to be observed, that otherwise he should have dismissed the bill with costs.

Whether insol-

Whether the insolvency (*a*) of the tenant is a valid ground for resist-

(*a*) By insolvency, here, is not meant the situation of a person who has

ing the specific performance of an agreement for a lease, has never been completely decided. In most of the cases in which insolvency has been made a ground of objection, it has been mixed up with other circumstances, as in the last case.

vency is a ground for refusing specific performance.

In *Buckland* v. *Hall*, 8 Ves. 92, A. being in possession under a subsisting lease, contracted in 1798 for a new lease, and filed a bill for specific performance of the agreement, and an injunction to restrain an ejectment. The lessor alleged a breach of the agreement in not performing the stipulated repairs, and that the plaintiff became insolvent in 1801, and paid a composition. Lord *Eldon*.—"Insolvency admitted, and not cleared away, is a weighty objection to a specific performance of an agreement for a lease, the party here seeking an execution beyond the law. Insolvency would be of weight with a jury. Such a question appears never to have been determined, and is of too much consequence to be decided upon mo-
*tion; I shall therefore only say, that, at the hearing, in general cases, it [*345]
would have considerable weight with me; in some cases more than others. If the tenant undertakes for nothing but the rent, it must be appreciated accordingly: *If, beyond that, he undertakes for a considerable expenditure upon the premises before he is to be placed in the relation of lessee; that is directly connected, as a most important circumstance, with the fact of solvency or insolvency.*" His Lordship, refusing to decide the point upon motion, dissolved the injunction.

Case of insolvency and misrepresentation on the part of the intended lessee.

In *Oherlihy* v. *Hedges*, 1 Sch. & Lef. 123, A. being possessed of a subsisting lease as trustee for B., the plaintiff, (who was then in gaol for debt), but representing himself as actual owner of the old term, entered into a contract with the landlord for a lease for three lives, and sixty-one years in reversion. Some years afterwards, B. filed a bill against A., as trustee, for an account of profits received, and against the defendant (the lessor) for performance of the contract. Lord *Redesdale*.—"The sole ground on which the plaintiff puts his right to come into this Court is the rule in equity, that a trustee shall gain no benefit to himself by any act done by him as trustee, but that all his acts shall be for the benefit of the *cestui que trust*. That rule is established in order to keep trustees in the line of their duty, and not for the purpose of being an injury to a third person, if the principal injury shall be to him." After some further observations, from which it may be collected that B. was a party to A.'s misrepresentation of his actual character, his Lordship continued, "What is

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taken the benefit of an insolvent debtors' act, for, in such a case, by the provisions of the late statute, the assignee is at liberty to adopt or reject the agreement. *Vide, post*, p. 346. As to the effect of the plaintiff in a bill for specific performance taking the benefit of an insolvent act, subsequently to the filing of the bill, see *De Minchwitz* v. *Udney*, 16 Ves. 466.

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the nature of the dealing between A. and the defendant? It is manifestly a dealing on the part of the defendant with a man of substance capable of performing the terms of the agreement. Such must have been the representation made to the defendant at the time; and it could not be imagined, for a moment, that the plaintiff would answer such a description. It is clear the defendant cannot be compelled to perform this agreement, unless he has covenants from A., as a man of substance, for the performance of these terms. Now, though, if the lease had been executed, A. would have been bound, and then the plaintiff would have had a right to an assignment on indemnifying A. from the covenants; yet where is his right to compel A. to enter into these covenants?" After remarking (which is important) that if A. had filed a bill against the defendant, he could not have had a specific performance, because he had misconducted himself; his Lordship observed, "There is a great deal to be considered with respect to contracts of this kind; here is a contract for the occupation of land, in which contract the solvency and character of the tenant are intimately concerned. They are not so important, however, as if the lease were at rack-rent; *there the solvency and character of the tenant are every thing.* Now, suppose a trustee were to contract for a lease at rack-rent, and that *cestui que trust* filed a bill for specific performance,—says the defendant, 'I agreed with this man, a good tenant, a solvent man, and [*346] skilled in the *improvement of ground: you are poor; you are ignorant of the cultivation; and, because he happens to be your trustee, though there is no trust apparent, must I put upon my estate a tenant who will ruin it?'" His Lordship, therefore, dismissed the bill.

3. *Whether a Contract for a Lease is assignable.*

Whether a contract for a lease is assignable.

The last case bears materially upon another question, which has arisen in the execution of contracts for leases, namely, whether the benefit of them is assignable, or, in other words, whether the intended lessee can transfer the right to a specific performance to a third person. The difference, in regard to its effect upon the rights and interest of the landlord, between such a substitution and an assignment by a person to whom a lease has been actually granted, will instantly be perceived. In the latter case, the lessee, being once bound by his covenants, is not discharged by a subsequent assignment; but, in the case under consideration, the obligation to be incurred by the covenants to be entered into goes with the benefit of the agreement, since the person claiming the performance of the agreement will be the person to enter into those covenants; and the permitting the intended lessee to assign the contract, is to allow him to avoid the obligation by the substitution of another covenanting party. Lord *Redesdale's* reasoning in *Oherlihy* v. *Hedges* applies, to a considerable extent, to such a case. If the landlord has entered into a contract to grant a lease to a man of substance and character, it seems to be un-

reasonable to compel him to execute it in favour of a person less wealthy or respectable, to whom the former may have assigned the benefit of the agreement, and the value of whose covenants would be much less. Of course, if the intended lease were, by the terms of the agreement, to contain a clause restrictive of alienation, the assignee of such an agreement could not, under any circumstances, claim its performance. *Weatherall* v. *Geering*, 12 Ves. 504.

Assignees of bankrupts and insolvents may claim performance.

Whether assignees of a bankrupt are entitled to the performance of an agreement for a lease, was a question formerly much doubted and discussed; *Willingham* v. *Joyce*, 3 Ves. 168; *Brooke* v. *Hewit*, Ib. 253; *Weatherall* v. *Geering*, 12 Ves. 504; but the affirmative seems to have been impliedly admitted in the provision introduced into the late bankrupt statute, 6 Geo. 4, c. 16, s. 75, (such provision having been first introduced in Sir Samuel Romilly's Act, 49 Geo. 3, c. 121), which compels them to elect either to adopt or reject the contract; and the same observation now applies to the assignees of insolvent debtors: see stat. 7 Geo. 4, c. 57.

The rule, that the assignees of a bankrupt are entitled to the benefit of an agreement for a lease, was assumed in a late case in the Court of Exchequer, *Powell* v. *Lloyd*, 1 Younge & Jerv. 427; and see p. 431, n.; the only point which was treated as admitting of discussion, being, whether a stipulation that the lease should contain a clause restraining assignment *without the consent of the lessor, precluded the right of the assignees. [*347] The point was not ultimately disposed of, (the effect of the order of the Court being merely to continue an injunction to the hearing); but it seems to have escaped observation, that the clause (which is formally set forth in the agreement) *would not have extended to assignees of a bankrupt, i. e.* to assignees *in law* (*vide post*), and therefore, as to them, was not restrictive. Where the provision in the agreement is such as the Court would execute, by introducing a restriction extending to assignees, or, in other words, to make the lease cease at bankruptcy, the assignees, of course, can take no benefit under the agreement.

Unless where agreement is by parol, partly performed.

It was decided upon the statute of 49 Geo. 3, (from which the late statute does not differ in this respect), that the act only extended to agreements *in writing*, and not to parol agreements partly performed; *Ex parte Sutton*, 2 Rose, 86; and therefore, the question, whether assignees are entitled to the benefit of agreements for leases, may yet arise on an agreement of this kind.

Assignees calling for the execution of the contract to lease, must, of course, comply with the terms upon which the lease would have been granted to the bankrupt himself, and must enter into the proper covenants; but, in order to avoid the responsibility they would thus incur, the usual course is for them to sell the benefit of the agreement, and then the assignee enters into the lessee's covenants, to which, if the assignee is a person of respectability, no objection is usually made.

IV. RENT, MODE OF ITS RESERVATION.

RENT, HOW RESERVED, AND TO WHOM, AND WHEN DUE.

1. *Effect of Informal Expressions.*—2. *Cannot enure to the Benefit of Persons claiming by Title paramount.*—3. *Different Effect of prior and subsequent Mortgages in regard to giving Title to Rent.*—4. *Rent, when due.*—5. *Effect of Reservation on alternative Days.*

Terms in which rent may be reserved.

Rent need not be reserved in the formal terms usually employed in framing the *reddendum;* for any expressions declaratory of the intention of the parties that a rent shall be payable, will have the same effect. Thus, where the lessee simply covenanted to pay an annual rent to the lessor, his heirs, executors, or administrators, it was held that this operated as a reservation, and the rent was incident to the reversion; and, therefore, that an action on the covenant should have been brought by the heir (the lessor being seised in fee) as the owner of the reversion, and not by the executor. *Drake* v. *Munday*, Cro. Car. 207. See also *Harrington* v. *Wise*, Cro. El. 486. But where the assignee of a lessee entered into an agreement with the original lessor, that he should have the premises as mentioned in the lease, and "to pay 8*l.* 10*s.* over and above the rent, annually, towards the good-will already paid by" the assignee; it was held, that this was not a rent, but a sum in gross. *Smith* v. *Mapleback*, 1 D. & E. 441.

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Cannot be reserved to a stranger.

*Rent cannot be reserved to a stranger; Co. Lit. 143. a.; Latch, 267; and, therefore, where A., who was seised in fee, made a lease in which B. his heir-apparent joined, and the rent was limited after the death of A. to B., this was held to be a void reservation. *Oates* v. *Frith*, Hob. 130. It would have been otherwise, it seems, if the rent had been reserved to the heir *eo nomine*. Ib.

The doctrine, however, that rent cannot be reserved to a stranger, of course does not prevent an annual sum from being granted to a third person, in consideration of a demise. It only means, that a sum so reserved, not being annexed to the reversion, has not the incidents of a rent-service: therefore, the owner of it cannot distrain; *Oates* v. *Frith*, Hob. 130; nor, it is apprehended, could he bring an action of debt, though such an action may be brought by the grantee of rent, once reserved, which becomes subsequently severed from the reversion. *Robins* v. *Cox*, 1 Lev. 22; *Allen* v. *Bryan*, 5 Barn. & Cres. 512. Where, therefore, the rent is intended to be reserved to a person who has not the legal estate, an express power of distress should be given, and (which, indeed, is common in all cases) an express covenant for payment of the rent; though it is said that an action of covenant may be sustained on the words of reservation to the stranger. *Deering* v. *Farringdon*, 1 Mod. 113. But the covenantee of course should be a party to the deed. Lord *Southampton* v. *Brown*, 6 Barn. & Cress. 718.

If, however, the estate created by the lease is freehold, a rent granted

to a stranger (being a rent seck within the stat. 4 Geo. 2, c. 28) would be recoverable by distress: but such a rent cannot issue out of leaseholds.

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It is generally presumed that an annual sum, reserved in the nature of a rent, is intended to follow the reversion; and the reservation of it to a different class of representatives than those on whom the reversion will devolve, will not have the effect of severing it from the reversion, this being regarded as a mere slip or inaccuracy of expression; as if the *reddendum* in a lease made by an owner *in fee*, be to him, his heirs, *executors*, or assigns, instead of to him, his heirs, and assigns, the word "executors" will be rejected, and the rent will go with the reversion, and belong to the heirs. *Sacheveral* v. *Frogat*, 2 Lev. 13. See also Cro. Car. 290.

Rent follows the reversion, notwithstanding error in terms of the reservation.

So, if a lessee for years, on granting an under-lease, reserve the rent to him *and his heirs*, or to him simply, without any words of limitation, it will, nevertheless, go with the reversion to his executors or administrators. *Darrell* v. *Wilson*, Cro. El. 644; *Constable's case*, cit. Cro. Car. 289; see also 2 Wms.'s Saund. 371, (n. 7). But it is sometimes laid down, that if a rent be reserved to a lessor (entitled in fee) and his *assigns*, or his *executors, administrators, or assigns*, it ceases at his death, and does not go to the heir. Dy. 45 a; *Edwyn* v. *Wootten*, 12 Rep. 35. This doctrine, (which is inconsistent with the liberality of construction that has generally prevailed in cases of this nature), it is probable, would not now be followed: at all events, it has been decided not to apply where the reservation of rent is "during the term," in which case it will belong to the heir *or [*349] devisee of the lessor, though limited to the executors or administrators. *Sacheverell* v. *Froggatt*, 2 Saund. 367.

So, where a tenant in tail reserves rent to him and his *heirs*, it will go to the issue inheritable under the entail. *Wyatt's case*, Dy. 12 b, 115 b; Harg. & Butl. Co. Litt. 113. b. See also *Cother* v. *Merrick*, Hard. 91, 95.

But where a tenant by the curtesy joined with the heir in tail in granting a lease, reserving the rent to them *and their heirs*, it was held to be void under the enabling statute, (32 Hen. 8, c. 28), which requires that the rent should be reserved to the persons entitled to the reversion, inasmuch as the reservation would carry a moiety to the heirs of the tenant by the curtesy. *Stacy* v. *Clark*, cit. Palm. 484. See also *Thompson's case*, Latch, 45.

So, where a husband and wife made a lease of the wife's lands of inheritance, reserving the rent to *the husband and wife, her heirs or assigns;* and the covenant to pay the rent was entered into with the husband and wife, her heirs and assigns; *Abbott*, C. J., doubted whether the husband could maintain an action on the covenant so framed (*a*), after the death of

Construction of certain modes of reservation.

(*a*) It is not easy to see how a more correct form of reservation could be adopted in such a case; and it is observable, that the terms prescribed

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the wife, supposing he were tenant by the curtesy; but as the wife had, in this case, died without having had issue, by which event the husband's estate had ceased, the case did not raise the point. It was objected, that the lessee, having executed the lease, was precluded from denying the husband's title to the rent; but the Court determined, that though, by the well-known rule, a lessee is estopped from shewing that his lessor had no title, he might shew, as in this instance, that his interest had ceased. *Hill* v. *Saunders*, 4 B. & C. 529; *S. C.* 7 D. & R. 17. On this point see also *Blake* v. *Foster*, 8 D. & E. 487; *Neave* v. *Moss*, 8 J. B. Moore, 389.

But it is well established, (and the point is of much practical importance), that where a tenant for life, demising lands under a power, reserves the rent to *him and his heirs and assigns*, this will enure to the benefit of the person for the time being entitled to the reversion (*b*)." See *Whitlock's case*, 8 Rep. 71; *Sands* v. *Leger*, 2 Lord Raym. 792; *Campbell* v. *Leach*, Ambl. 740; see also 3 M. & S. 396. *A fortiori*, where it is reserved to the lessor, his heirs and assigns, *and to every person to whom the reversion shall belong during the term. Whitlock's case*, 8 Rep. 71. Many of the preceding cases shew the soundness of the advice *given in *Whitlock's case*, to make the reservation in general terms, and not to any person or persons in particular, leaving the law to make the distribution; this would be found very convenient as a general rule, and should invariably be adopted, where there is any doubt as to the persons to whom the reservation is to be made.

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Persons claiming by a paramount title, not entitled to rent.

It may be observed, in this place, that in order to entitle persons to the rent reserved upon a lease, they must claim under or in privity with the lessor, and not under a title paramount to his. On this principle, a surviving wife is not entitled to the rent reserved upon an under-lease granted by her husband of her lands, (*vide ante*, p. 328), nor a joint tenant to the rent accruing under a lease granted by his companion, (*vide ante*, p. 326); nor an administrator *de bonis non* to a rent reserved to an executor, (*vide ante*, p. 324). This doctrine was also, until recently, considered to exclude a mortgagee from claiming the rent reserved on a lease granted by the mortgagor, *subsequently* to the mortgage. *Alchorne* v. *Gomme*, 2 Bing. 54. But if the demise was *anterior* to the mortgage, there was no such difficulty, as the mortgage operated as a grant of the reversion, entitling the mortgagee to the rent subsequently accruing, and the remedies for its recovery. And after notice to pay the rent to the mortgagee, payment to the mortgagor was clearly bad. *Moss* v. *Gallimore*, Doug. 279.

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by the statute 32 Hen. 8, c. 28, s. 3, for reserving rent in leases made by the husband and wife of the wife's inheritance, are substantially the same, namely, "to the husband and to the wife, and to the heirs of the wife."

(*b*) See S. P. as to Covenants, *Isherwood* v. *Oldknow*, 3 M. & S. 396, *post*.

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The distinction, however, in regard to the fact of the demise being anterior or posterior to the mortgage, is now overruled; for, in the late case of *Pope* v. *Biggs*, 9 Barn. & Cress. 245, where the plaintiffs, who were the assignees in bankruptcy of the mortgagor, brought an action for use and occupation against one of the mortgagor's tenants, who sought to discharge himself by certain payments made to the mortgagees, claiming under a mortgage *subsequent* to the demise, after notice from them; and it was contended, that the tenant could not avail himself of any of these payments, because, if the mortgagor himself had brought an action against the tenant, he could not have pleaded *nil habuit in tenementis*, and, consequently, could not have denied the mortgagor's right to receive the rent: the Court held, that the payments were good. Mr. Justice *Bayley* said—"I have no doubt, that, in point of law, a tenant who comes into possession under a demise from a mortgagor, *after a mortgage executed by him*, may consider the mortgagor his landlord, so long as the mortgagee allows the mortgagor to continue in possession, and receive the rents; and that payment of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents. It is undoubtedly a well-established rule, that a lessee cannot dispute the title of his lessor at the time of the lease, but he is at full liberty to shew that the lessor's title has been put an end to. There is another rule of law, *viz.* that the mortgagor cannot dispute the title of the mortgagee. When the mortgagor occupies the premises, he holds under the mortgagee, who may put an end to the rights of the mortgagor. *Keech* v. *Hall*, Doug. 21, shews, that where a lease has been granted by a mortgagor, after the mortgage, and the mortgagee has suffered the mortgagor to continue in possession, though the lessee is not entitled to say that the mortgagor never had any interest in the premises, he may say that he had a defeasible title, and that that title has since been defeated; or, in other words, that he had such a title only as a mortgagor may have. It is clear, that the mortgagee, in this case, might have maintained an ejectment against the tenant of the mortgagor, and evicted him, and that such eviction by title paramount would be an answer to an action for rent; and that being so, it seems to follow that it was not necessary for him to go through the form of an ejectment, if the tenants were willing to attorn and pay their rents to him. It was sufficient for him to do any act which put an end to the title of the mortgagor. Here the mortgagee, by giving notice of the mortgage to the tenants, has put an end to the right of the mortgagor to receive the rents. At common law, the attornment of the tenant would have been necessary, to entitle the mortgagee to the rents; but the effect of the statute 4 Ann. c. 16, ss. 9, 10, is to place a tenant, as soon as he has notice of the mortgage-deed, in the same situation as if he had attorned to the mortgagee, with this excep-

Mortgagee held to be entitled to rent accruing under a letting *posterior* to his mortgage.

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tion, that he is not to be prejudiced by any act done by him, as holding under the grantor, until he has had notice of the mortgage-deed. That being so, as the attornment at common law would have related back to the time of the grant, it follows, that all the rents due from the tenant (not actually paid over to the mortgagor), belong of right to the mortgagee. Here the defendant claims to retain the rents which were actually due from the tenants at the time when they had notice of the mortgage, as well as rents which became due afterwards. As the tenants were bound by law, (after notice), to pay to the mortgagee all the rents not actually paid over to the mortgagor, I think the defendant is entitled to retain those rents in respect of which he made payments to the mortgagees, and that he is entitled also to retain the other sums, in order to meet the arrears of interest which will next become due. He held those sums for the persons entitled by law to receive them, and the mortgagees are those persons."

Rent, when due.

Where a rent is reserved generally, and not as it usually is, by quarterly or half-yearly payments, nothing is due until the end of the year; see Latch, 264, 1 D. & E. 445; and parol evidence is inadmissible to [*351] *vary it by shewing a different mode of payment by other tenants. *Carter* v. *Pryke*, Peake, N. P. C. 95.

Days of payment transposed, where.

Where the rent is to be payable annually during the term, on certain days, and the day which is first named is not the first which happens during the term, the local order of the words will be disregarded, and the rent will be payable on the first of the days occurring in point of time. Thus, if a man makes a lease in the month of August, reserving rent annually at Lady-day and Michaelmas, during the term, the first payment will be due at Michaelmas, the words being read as transposed. *Hill* v. *Grange*, Plowd. 171; Co. Litt. 217. b.

As to rents payable in advance.

Rent is, properly speaking, a consideration for past enjoyment, but it is sometimes reserved, to be paid in advance; in which case it seems to partake of the nature of a fine or foregift. See 1 Lord Raym. 367. Where the rent is so intended to be reserved, it should be made clearly apparent, whether the payment in advance is to be of the current quarter for the time being, during the whole term, or for the first payment only, which is sometimes left in ambiguity. In *Holland* v. *Palmer*, 2 Stark. 161, where a house was let for twelve months, at the yearly rent of 80*l.*, the rent to commence at Michaelmas, and to be paid three months in advance, such advance of 20*l.* to be paid on taking possession; Lord *Ellenborough* was of opinion that the agreement for the advance was confined to the first quarter only; his Lordship observing, that otherwise it would have been easy to have said "*always* paid in advance."

Rule, where rent is payable on several alternative days.

Formerly, it was much the practice to make the rent payable on two alternative days, as on the usual feasts or quarterly days of payment, *or* within a certain number of days afterwards. This was held to give the

lessee an option to pay it on either day, and if tendered on the first of the days, the lessor was bound to accept it. *Barwick* v. *Foster*, Cro. Jac. 227, 233; see also *Horn* v. *Barbar*, Cro. Car. 421. But this option was intended for the benefit of the lessee only; and, for all other purposes it seems, the rent in such cases is not considered as due until the ulterior day. Thus, it is not demandable by the lessor until then; and if he (in the case of a lessor having the inheritance) die in the interval between the two days, it will belong to his heir and not to his executor. *Glover* v. *Archer*, 4 Leon. 247, pl. 403; *Clun* v. *Fisher*, Cro. Jac. 309; *Thompson* v. *Field*, Ib. 499. But if the lease terminate on the first of the two days, the rent is due on that day, the alternative period being considered as intended to be allowed during the term only. *Barwick* v. *Foster*, Cro. Jac. 227, 228; *S. C.* Yelv. 867.

RENT, HOW RESERVED, AND TO WHOM, AND WHEN DUE.

Where rent was reserved at the feast of John the Baptist, and at Christmas, *or fourteen days after*, the first payment to be made at Christmas next after the date, the lessee was held to be entitled to fourteen days after the first Christmas, as well as the others. *Anon.* 2 Show. 77.

This mode of reserving rent has properly fallen into disuse, for, in *modern leases, the rent is invariably reserved on one day certain, with generally a right of entry on non-payment within a definite period afterwards.

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V. APPORTIONMENT OF RENT.

APPORTIONMENT OF RENT BETWEEN LESSOR AND LESSEE.

I. IN RESPECT OF THE CORPUS OF THE LANDS.—1. *By Act of Law, as by the Descent of different Parts of the Reversion on different Heirs, &c.* —2. *By Act of the Parties, as by the Lessor's Alienation of* Part, *&c.* —3. *Where Lessee is evicted from Part.*—4. *Mode of effecting, and Consequence of, Apportionment.*

II. APPORTIONMENT IN RESPECT OF TIME.—1. *Between Lessor and Lessee,* —2. *As to the Claim of the Representatives of Tenant for Life under stat.* 11 Geo. 2.—3. *Whether stat. applies to Tenants in Tail—Compositions for Tithes—Tenancies from Year to Year in certain cases, &c.*—4. *Effect of Death of Tenant for Life,* on *the Day the Rent becomes due.*—5. *Effect of Payment of Rent by Tenant on the Day, &c.*

I. *Apportionment in respect of the* corpus *of the Lands*—1. *By Act of Law.*

Apportionment by act of law.

This arises where lands, which are demised at an entire rent, become divided among different persons; as, where a person seised of lands of gavelkind tenure, and lands decendible at common law, demises the whole at one rent, and dies, the reversion in part descends to the gavelkind heirs, and the residue to the heir at common law. So, where freeholds and leaseholds are let together, at an entire rent, an apportionment takes place at the death of the lessor, among the real and personal representatives. *Huntly* v. *Roper*, 1 And. 21.

APPORTIONMENT OF RENT BETWEEN LESSOR AND LESSEE.

By the act of the parties.

2. *Apportionment by the Act of the Parties.*

Rent may also become apportionable by the act of the parties; as where the lessor disposes, by deed or will, of *part* of the lands in reversion to which the rent belongs, and the lessee attorns to such grantee; *West* v. *Lascelles*, Cro. El. 851; *Collins* and *Hardings' case*, 13 Rep. 57 a; Dy. 4 b; *S. C.* Cro. El. 606, 622; see also 1 Jac. & Walk. 188; or where the lessor devises specific portions of the rent to different persons. *Ard* v. *Watkin*, Cro. El. 637. But the lessee is not bound by any apportionment made by the lessor without his concurrence. And, therefore, in a late case, where A. had leased two messuages, at an entire rent of 65*l.* 10*s.*, and sold and conveyed the reversion in one messuage, and 40*l.*, part of the rent, to B., it was held that B. did not acquire the same rights and remedies in respect of such rent, as if it had been apportioned by a jury. *Bliss* v. *Collins*, 5 Barn. & Ald. 876; *S. C.* 1 Dowl. & Ryl. 291. And see *S. C.* in Equity, 4 Madd. 229, 1 Jac. & Walk. 475.

Lessee not bound by apportionment, when.

Whether rent is apportionable upon the *lessee's* alienation.

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It is laid down, by a respectable writer, that rent "is not apportionable by the *lessee's* alienation;" see Com. *Landl. & Ten.* 195; but this pro-*position, it is submitted, is not completely accurate, since, for some purposes at least, the rent is clearly apportionable in such a case. Thus, where the lessee aliens part of the land, the alienee is liable to a *proportional* part of the rent. *Stevenson* v. *Lambard*, 2 East, 580. And though it is true, that the lessee cannot discharge himself from his liability, upon his express covenant, to any part of the rent, by the alienation of *part* of the lands, (Bailiff of *Ipswich* v. *Martin*, 1 Roll. Ab. 235, pl. 17), any more than he can exonerate himself from the *whole* rent, by an assignment of *all* the lands; *Orgill* v. *Kemshead*, 4 Taunt. 642; yet the liability of the assignee to a proportion shews that, for this purpose, an apportionment of the rent *does* take place by the act of the lessee. So, where an assignee (who is liable to the rent by privity of estate only, and not by contract) aliens part of the land, he and his assignee from that time are respectively liable, according to their respective parts in the land. The right of distress for the whole rent, upon every part of the land, of course remains unimpeached.

3. *Apportionment where Lessee is evicted from Part.*

Apportionment in case of eviction.

Another instance in which rent is apportioned is, where the lessee is evicted from part of the lands, by a title paramount to that of the lessor, in which case he is bound to pay a rateable proportion of the rent for the remainder. Co. Litt. 148. b.; *Smith* v. *Malings*, Cro. Jac. 160; *Stevenson* v. *Lambard*, 2 East, 575; and see *Walker's case*, 3 Rep. 22 b. In a late case, a person demised lands of which he was seised in fee, and lands of which he was tenant for life, with power of leasing, at an entire rent, and the lease being void as to the lands intended to be demised by vir-

tue of the power, the remainder-man brought an ejectment against the lessee for the *whole* lands, on the ground that the rent being entire, the lease was void *in toto:* but the Court held that he was only entitled to recover the lands comprised in the power, for that the rent might be apportioned. *Doe* d. *Vaughan* v. *Meyler*, 3 M. & S. 276, overruling *Rees* d. *Parkins* v. *Phillip*, Wightw. 69. And where the eviction is a consequence of the lessee's own tortious act, as where he makes a feoffment of part, or commits waste in part, of the lands, or the lessor enters for the forfeiture, (being specially authorized on the breach of a condition to enter upon part), the rent is apportioned, the lessee being liable to a proportion of the rent for the remainder. 1 Roll. Rep. 331; Moor. 203; 3 Rep. 22 b. And the principle applicable to the case of eviction obtains, where the lessee has never been in the enjoyment of part of the subject contracted for; and therefore, where a person entered, under an agreement for a lease, (but which he never signed), by which he was to have a lease of land and an exclusive right of sporting, and it turned out that the lessor had no power to grant such a privilege; it was held, in an action for use and occupation, that a proportional deduction *from the rent was to be made on that account. *Tomlinson* v. *Day*, 2 Brod. & Bing. 680.

APPORTIONMENT OF RENT BETWEEN LESSOR AND LESSEE.

Where part of the subject of the lease fails.

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It is laid down, in an early case, that where lands and goods are let at an entire rent, and the lessee is evicted from the goods, he is entitled to no allowance for the *goods*, as the rent issues out of the lands only. *Emott* v. *Cole*, Cro. El. 255. See also *Farewell* v. *Dickenson*, 6 Barn. & Cress. 251; *S. C.* 9 D. & R. 245. But see *Richards le Taverner's case*, Dy. 56 a. Upon this principle too, it has been held, that a judgment creditor is not entitled to a proportion of the rent, in respect of goods demised with lands at one rent; though, if they are let at distinct rents, he may take the rent of the goods. *Cadogan* v. *Kennett*, Cowp. 432. The rule applicable to eviction extends also to the case of the destruction or extinguishment of part of the subject by the act of God, as by the overflowing of the sea; but as to fresh water, see 1 Roll. Abr. 236.

Rule, where lands and goods are let at an entire rent, and tenant is evicted from the goods only.

Lastly, rent is apportioned, where the lessee surrenders part of the land to the lessor himself. See *Smith* v. *Malings*, Cro. Jac. 160. See also *Anon.* Moor. 114.

4. *Mode of effecting, and Consequence of, Apportionment.*

The proper action in which to apportion rent between a lessor and lessee, is an action of debt; see Brownl. & Gouldsb. 33; and it cannot be apportioned in an action of covenant, the contract being entire; but in regard to an assignee, whose obligation arises from privity of estate, and not of contract, the case is different; against him, therefore, the rent may be apportioned in an action of covenant. *Stevenson* v. *Lambard*, 2 East, 579.

How rent is to be apportioned.

The general consequence of apportionment is, that the lessee is liable

Consequence of apportionment.

APPORTIONMENT OF RENT BETWEEN LESSOR AND LESSEE.

to several actions or distresses for the rent, by the respective owners of the several parts. It should be observed in regard to conditions of re-entry, the other usual remedy for the recovery of rent, that, being entire and indivisible, they are destroyed by a severance of the reversion. *Knight's case*, 5 Rep. 54; *Winter's case*, Dy. 308, 309. But to this rule there are, it seems, two exceptions: *first*, where the reversion becomes severed by the act of law, as where part descends to one heir and part to another, in which case "the reversion, rent, *and condition* are divided;" *secondly*, where the severance arises from the act and wrong of the lessee "as if the lessee makes feoffment of part, or commits waste in part, and the lessor enters for the forfeiture, or recovers the place wasted, there the rent *and condition* shall be apportioned; for none shall take advantage of his own wrong." See *Knight's case*, 5 Rep. 54 b, 4 Rep. 120 b, and 1 Roll. Rep. 331; Moor. 203; Dyer, 309 a.

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v.—2. APPORTIONMENT OF RENT IN RESPECT OF TIME.

Whether rent for proportion of an integral period recoverable.

Where a lessee is evicted by title paramount in the middle of a quarter, it is doubtful whether any proportion of the rent for that quarter is recoverable by the lessor; Chamb. *Land. & Ten.* 593; (the authority cited in support of this position, 10 Rep. 128 a, seems to be irrelevant); certainly not, where the eviction arises from the act of the lessor himself. To this principle, it is conceived, may be referred a late decision, that, where a tenant from year to year, whose rent was payable half-yearly, without giving any notice to quit, quitted the premises at the expiration of the current year, and the landlord, *before the end of the next half year*, let the premises to another tenant, he was not entitled to recover any rent for the intervening period; the rent being, by the contract, reserved to be paid half-yearly, and no half-yearly payment having become due when he re-let the premises. *Hall* v. *Burgess*, 5 B. & C. 332; *S. C.* 8 D. & R. 67. See also *Grimman* v. *Legge*, 8 Barn. & Cress. 324; *S. C.* 2 M. & R. 438.

REPRESENTATIVES OF TENANT FOR LIFE, WHEN ENTITLED TO RENT.

Here it may be useful to inquire in what cases the representatives of a tenant for life, who has granted a lease, or to whom the rent is payable for his life, and who dies in the middle of a quarter, are entitled to the rent for the portion of the quarter which had then elapsed.

Stat. 11 Geo. 2, c. 19.

Before the stat. 11 Geo. 2, c. 19, where a tenant for life died in the interval between two days of payment, and the lease granted by him determined at his decease, the rent for the fractional period was irrecoverable. *Clun's case*, 10 Rep. 127; *Jenner* v. *Morgan*, 1 P. W. 392. And see *Pilkinton* v. *Dalton*, Cro. El. 575; 8 Ves. 311. But that statute, s. 15, provided, that where any tenant for life should happen to die before or on the day on which any rent was reserved or made payable, *upon any demise, &c. which determined on the death of such tenant for life*, his execu-

Representatives entitled on leases determining at the death of tenant for life.

tors or administrators might recover from the under-tenant, if such tenant for life died on the day on which the same was made payable, the whole, or if before such day, then a portion of such rent, according to the time such tenant for life lived of the last year, or quarter of a year, or other time in which the rent was growing due, making all just allowances, or a proportional part thereof, respectively.

REPRESENTATIVES OF TENANT FOR LIFE, WHEN ENTITLED TO RENT.

Under this statute, it is clear, that where a tenant for life grants a lease, or creates a tenancy, which determines with his own life, whether *the lease or tenancy be expressly limited to determine on that event, or it be intended to have a larger operation by virtue of a power, but is, for want of compliance with the terms of the power, in effect a lease for life only, the rent belongs to his representatives up to the day of his decease. *Clarkson* v. Earl of *Scarborough*, 1 Swanst. 354, n.; *Ex parte Smythe*, Ib. 337; *Symons* v. *Symons*, 6 Madd. 207. Some persons have fallen into the error of supposing, that the statute only applies where the land is leased by the tenant for life *by deed;* but such a construction is not only contrary to the technical import of the word "demise" in the act, but to the clearest authority. *Clarkson* v. Lord *Scarborough*, 1 Swanst. 354, n.; *Symons* v. *Symons*, 6 Madd. 207. Indeed, the editor should not have thought it necessary to advert to a point apparently so little open to dispute, if a case, very recently occurring in practice, were not fresh in his recollection, in which the notion had appeared to have rather extensively prevailed.

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Demise by deed not necessary.

The statute under consideration has received a liberal construction; for it has been held to apply to tenants *in tail*, whose leases (not being within the enabling statute, *supra*, p. 326, or by the failure of issue inheritable under the entail) determine at their decease; *Whitfield* v. *Pindar*, C. B. 1781, cit. 2 B. C. C. 662; 8 Ves. 311. (See also *Pagett* v. *Gee*, Amb. 198; and *vid.* 1 Swanst. 356. See some observations in Mr. Swanston's excellent note, 1 Swanst. Ch. Rep. 347, n., on the case of *Vernon* v. *Vernon*, 3 B. C. C. 659. See also 8 Ves. 312); and would probably be held to extend to estates *pur autre vie*. See 3 Taunt. 331.

Statute applies to tenants in tail.

In two late cases, the statute was treated as not applying to a lease of tithes made by the incumbent of a rectory; *Hawkins* v. *Kelly*, 8 Ves. 308; or to a composition by a rector, in lieu of tithes. *Aynsley* v. *Wordsworth*, 2 Ves. & Bea. 331. In neither of these cases, however, was it necessary to decide the point, the representatives of the deceased incumbent being entitled upon another ground. The apportionment of compositions for tithes appears to have been the subject of some obscure and contradictory decisions. *Anon.* Bunb. 294; *Meely* v. *Webber*, noticed 2 Eq. Ca. Ab. 704, n.; *Talbot* v. *Sammon*, Ib. The case of *Williams* v. *Powell*, 10 East, 269, has been considered as determined upon its particular circumstances. 2 Ves. & Bea. 336. So far as it goes to establish that the apportionment of an annual sum, paid as a com-

Whether tithes are apportionable.

REPRESENTATIVES OF TENANT FOR LIFE, WHEN ENTITLED TO RENT.

position for tithes, is regulated by any other standard of computation than that of *time*, it seems to be overruled by *Aynsley* v. *Wordsworth*, 2 Ves. & Bea. 331. To prevent all questions in regard to leases of tithes, and *agreements for compositions, an express reservation should be made of a proportional sum for the fractional part of the year, half-year, or quarter, (if any), occurring immediately preceding the incumbent's decease. But to return to the general subject.

Suggestion in regard to tithes.

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Where leases do not determine with the life of tenant for life, no apportionment.

It is clear, that where the lease does *not* determine with the life of tenant for life or in tail, being made in pursuance of a power, or by a tenant in tail, by virtue of the statute (the lessor leaving issue inheritable under the entail), the rent is *not* apportioned between the lessees of the tenant for life and the remainder-man, or the lessees of the tenant in tail and the issue in tail, but belongs for the entire period to the latter. And the same principle would unquestionably apply to a lease subsisting antecedently to the creation of the estate for life or in tail, which, of course, would be unaffected by the determination of that estate. But it has never been expressly decided what would be the result, in the case of a prior-existing tenancy from year to year, which the tenant for life permitted to continue until his decease. Upon principle, there seems to be strong ground to contend *against* the claim of the representatives of the tenant for life in such a case. Thus, suppose C., owner of the fee, lets lands from year to year, and dies during the tenancy, having devised them to A. for life, with remainder to B. in fee; A. lives several years without disturbing the tenancy, and then dies in the middle of a quarter: now it is clear that A. *might* have determined the tenancy during his life by a regular notice to quit, and then have re-let the premises; and as the interest derived under that letting must necessarily have determined with his life, the rent for the whole of that period would clearly have belonged to him; but as he has not exercised this right, but has permitted the tenancy created by his testator to continue until his own decease, it is apprehended that the rent for the entire current quarter would go to the remainder-man, inasmuch as the tenancy would not be determined by such decease, since a demise from year to year creates a continuing interest, until determined on one side or the other by notice. If a tenant for life, therefore, in such a case, wished to entitle his representatives to the rent for the fractional period, (if any), preceding his decease, of the current quarter or half year, he should terminate the original holding by notice, and then re-let the premises to the same or any other tenant; though the interest of the remainder-man would probably be better consulted by his agreeing that an apportionment should be made under the existing tenancy, than that the land should be re-let subject to the disadvantage arising from the tenant's interest being liable to be suddenly determined by the lessor's death.

Death of tenant

If a tenant for life, or in tail, die *on* the day on which the rent is made

payable, (whether before or after sunset), the remainder-man or reversioner, and not his own representatives, are entitled; for the rent, though *demandable* at sunset, is not *due* until midnight; Earl of *Stafford* v. Lady *Wentworth*, Prec. Ch. 555; *S. C.* 9 Mod. 21; Lord *Rockingham* v. *Oxenden*, Salk. 578; *S. C.* nom. Lord *Rockingham* v. *Penrice*, 1 P. W. 177; *Norris* v. *Harrison*, 2 Madd. 268. But if the lessee have actually paid the rent to the tenant for life or in tail, on the day on which it becomes due, Lord **Rockingham* v. *Penrice*, 1 P. W. 177, or even *before* the day, provided the lessor live to that day, (*S. C.* stated from Reg. Lib. 1 Swanst. 346, n.), the lessee will be discharged: though, if the lessor subsequently die before the end of the day, the remainder-man may recover it from the representatives of the tenant for life. And it should be observed, that where a lessee under a lease which determines at the death of the lessor, but is not within the statute, pays over the whole rent for the current quarter, or other integral period, to the person entitled in remainder, such person will be compelled to account for a proportion of it to the lessor's representatives, though the latter had no remedy against the tenant for its recovery. *Paget* v. *Gee*, Amb. 198; *Hawkins* v. *Kelly*, 8 Ves. 308; *Aynsley* v. *Wordsworth*, 2 Ves. & Bea. 331. See also *Vernon* v. *Vernon*, 2 B. C. C. 659.

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for life, &c. *on* the day the rent becomes due.

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It remains only to be noticed, that the statute does not authorize the Court to apportion taxes and other annual current charges on the estate, between a tenant for life and remainder-man; and, therefore, where the tenant for life having died in the middle of the year, it was suggested, on the part of the tenant in tail in remainder, that his estate ought not to bear the whole of the land-tax, quit-rent, &c.; Sir *W. Grant*, M. R., held, that the statute did not apply. *Sutton* v. *Chaplin*, 10 Ves. 67.

Taxes and charges not apportionable.

VI. PROVISOES OR CONDITIONS OF RE-ENTRY, HOW CONSTRUED.—WHERE RELIEVED AGAINST IN EQUITY.—AS TO CONDITIONS NOT TO ASSIGN OR UNDER-LET.

CONDITIONS OF RE-ENTRY.

A proviso or condition giving to the lessor a right of re-entry, on non-payment of the rent, within a certain number of days, is now inserted in leases as a matter of course; indeed, it is now very usual to introduce a general clause, authorizing re-entry on breach of any of the covenants. Considering to how many particulars the ordinary covenants in leases extend, and that some of them are of a nature which may easily be broken by inadvertence, and without any wilful default on the part of the lessee, or any material injury to the lessor; and considering, too, that, in general, as we shall presently see, relief is not now to be obtained in equity against the effect of such conditions; the practice of arming the lessor with so extensive a power can hardly be defended. The Courts, however, give a strict construction to such provisions; and therefore, in a late case, where there was a condition to re-enter on breach of any of the co-

Conditions of re-entry on non-payment of rent and non-performance of covenants.

"Hereinafter" how construed.

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venants therein-*after* contained, and it appeared that all the covenants on the part of the lessee *preceded* the clause in question, the Court refused to depart from the literal construction by rejecting or changing that word, though the clause was thereby rendered nugatory. *Doe* d. *Spencer* v. *Godwin*, 4 M. & S. 265 (*a*).

[*359] *Indeed, it is a doctrine much insisted on in the early cases, that clauses imposing forfeiture, which is odious in law, are to be strictly construed. See *Moody* v. *Garnon*, Moor. 848. But it is not to be understood from this doctrine, that conditions are altogether void, unless expressed in the formal technical terms in which they are usually framed; for in many instances, very informal expressions have been held to amount to a condition, where such could be collected to be the intention of the parties.

What construed to amount to a condition.

Thus, in *Simpson* v. *Titterell*, Cro. El. 242; *S. C.* cit. Moor. 707; 2 Rep. 71; the words "*provided always*, and it is covenanted and agreed between the said parties," that the lessee shall not assign, &c. following a demise, amounted to a condition. So, in *Whitchcot* v. *Fox*, Cro. Jac. 398, a covenant by the lessee not to alien *on pain of forfeiture*, was held to be a condition. Again, in *Doe* d. *Henniker* v. *Watt*, 8 B. & C. 308, 1 M. & R. 694, where, in an instrument not under seal, it was stipulated and *conditioned* that the lessee should not assign, &c., the words were held to create a condition. See also *Thomas* v. *Ward*, Cro. El. 202; but see *Archdeacon* v. *Jennor*, Cro. El. 604. But a mere covenant to "give up" the premises on a certain event, without some expressions declaratory of the intention of the parties to reserve to the lessor a right of re-entry, on that event, will not be construed as a proviso or condition, so as to enable him to maintain an ejectment.

Agreement to "give up" the premises, how construed.

Thus, in *Doe* d. *Wilson* v. *Phillips*, 9 J. B. Moore, 46; *S. C.* 2 Bing. 13, where A. agreed to let certain premises, and B. to take them for twenty-one years at a certain rent, and the lease (for such the instrument was treated to be) contained the following clause: "And it is further agreed and clearly understood, that in case the said A. or his *heirs*, executors, or assigns, should want any part of the said land to build, or otherwise, &c., then the said B., or his heirs, executors, or assigns, *shall and will give up that part or parts of the said land*, as shall be requested by the said A., by his making an abatement in proportion to the rent charged, and also to pay for so much of the fence, at a fair valuation, as he shall have occasion from time to time to take away, by his giving or leaving six months' notice of what he intends to do." And there was a further stipulation, that after the said A. had taken so much of the said land, B. should be at liberty to relinquish the remainder, being allowed

(*a*) See an instance of the word herein-*after* being construed herein-*before* in a will. *Bengough* v. *Edridge*, 1 Simons, 173.

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certain deductions. It was held, that this was a covenant only, on the part of the lessee, and not a condition, and, therefore, that the landlord could not maintain an ejectment after the notice.

Right of entry cannot be reserved to a stranger.

A right of entry cannot be reserved to a stranger to the estate; and, therefore, where a lease was made by a trustee and several *cestuis que trust*, and the right of entry upon breach of covenant was limited to the *cestuis que trust*, it was held, that they could not maintain an ejectment, as the power should have been reserved to the person who had the legal estate. *Doe* d. *Barber* v. *Lawrence*, 4 Taunt. 23.

Alleged distinction between leases void and voidable.

In the early authorities, much stress is laid on the distinction between a proviso or condition making a lease for years absolutely void on breach of covenant, or any other given event, and the limiting to the lessor a *mere right of entry on such event, the lease being, it was considered, [*360] *ipso facto* determined in the former case, and therefore incapable of confirmation by any act of the lessor recognizing the existence of the tenancy, as the acceptance of rent, or the like; while, in the latter case, it was admitted on all hands, that the acceptance of rent accruing subsequently to the forfeiture, confirmed the lease. *Crocker* v. *Dormer*, Poph. 27; *Finch* v. *Riseley*, Ib. 33; *Pennant's case*, 3 Rep. 64; *Finch* v. *Frogmorton*, Cro. El. 220; *Davy* v. *Matthew*, Ib. 649; *Green's case*, Cro. El. 3; *Mulcarry* v. *Eyres*, Cro. Car. 511; *Simpson* v. *Butcher*, Dougl. 61; *Goodright* d. *Walter* v. *Davids*, Cowp. 803; Co. Litt. 215; and see Woodf. *Land. & Ten.* 259. But this doctrine, so far as it goes to render leases which are declared to cease on a given event, absolutely void to all purposes, has been considerably qualified in later times. Thus it has been held, that a lessee cannot avail himself of his own act to vacate the lease, on the well-known principle, that a man shall not be permitted to take advantage of his own wrong; and, therefore, in a late case, where, in an action on a bond given by a third person for the performance of the covenants in a lease, the obligee pleaded that the lease was void, by reason of the non-payment of rent for a certain period, this was held to be bad. *Rede* v. *Farr*, 6 M. & S. 121. See also *Reid* v. *Parsons*, 2 Chitty, 247. So, where a lease of coal mines, reserving a royalty rent for every ton of coals raised, contained a proviso, that the deed should be void to all intents and purposes, if the tenant should cease working at any time for two years; it was held to be void only *if the lessor thought fit to make it so;* and, therefore, that the lessee could not allege, in answer to an ejectment by the lessor for a breach of the proviso, that the lease had ceased under the proviso long since, and that the lessor had subsequently received rent, by which a tenancy from year to year was created, entitling him (the defendant) to notice to quit. *Doe* d. *Bryan* v. *Bancks*, 4 Barn. & Ald. 401.

Whether leases declared to be void are con-

In a late case, a proviso that, on non-payment of rent or breach of any of the covenants, the term should cease and be void, *and it should be*

CONDITIONS OF RE-ENTRY.

firmed by acceptance of rent.

lawful for the lessor to re-enter, was construed to make the lease voidable only, the two members of the sentence being read as if transposed; and Lord *Tenterden* expressed an opinion, that even *if the lease had been simply declared to be void, he should still have thought that the receipt of rent by the landlord would be an admission that the lease was subsisting at the time when that rent became due, and that he could not afterwards insist upon a forfeiture previously committed.*" And his Lordship commented upon the injustice of enabling a lessor to eject a tenant after he had given him reason to believe the forfeiture was waived, and the latter had expended money in improvements. *Arnsby* v. *Woodward*, 6 Barn. & Cress. 523. This doctrine, it is obvious, puts an end to all substantial distinction between the effect of a proviso declaring the lease to be void, and one giving the lessor a right of entry for the forfeiture. It should be observed, that, though the acceptance of rent is a waiver of a right of re-entry for an antecedent breach of covenant, it has no effect upon posterior acts. If, therefore, the breach be occasioned by an act which is not complete at the time of such acceptance, but is going on continuously, *de die in diem*, as that of ceasing to work a coal mine, *Doe* v. *Bancks*, 4 B. & A. 401, using a house for a prohibited purpose, *Doe* v. *Woodbridge*, 376, omitting to insure under a covenant for insuring and keeping insured against fire. *Doe* d. *Flower* v. *Peck*, 1 Barn. & Adolph. 428. The acceptance of rent does not preclude the lessor from availing himself of the forfeiture incurred by the continuance of the breach.

Rule as to leases for lives.

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*As to leases for lives, which, as they continue by livery, cannot be determined without some corresponding act; the rule has always been, that a proviso declaring that, on a given event, the estate shall cease and be void, conferred a right of entry only. *Browning* v. *Beston*, Plow. 135. Where entry is necessary on the part of the subject, office must be found in the case of the king. *Finch* v. *Riseley*, Poph. 53.

FORFEITURE UNDER CONDITION, WHERE RELIEVED AGAINST IN EQUITY.

EQUITABLE RELIEF FROM FORFEITURE UNDER CONDITIONS.

Forfeiture under conditions for non-payment of rent, relieved against.

Conditions for re-entry on the non-payment of rent are regarded in equity in the character of penalties only, and as a means of enforcing the payment of the rent; and as the injury arising from the breach of such conditions admits of compensation, Courts of Equity have long been in the habit of relieving lessees who have incurred a forfeiture in this manner, on payment or tender of the amount of rent due. *Wadman* v. *Calcraft*, 10 Ves. 67; *Davis* v. *Best*, 12 Ves. 475; *Hill* v. *Barclay*, 16 Ves. 405; *S. C.* 18 Ves. 58; *Lovat* v. Lord *Ranelagh*, 3 Ves. & Bea. 24; and this might formerly have been done at any period, even after the lessee had been evicted by an action of ejectment; but the statute of 4 Geo. 2, c. 28, restrained such relief, by providing that in case the tenant shall suffer judgment to be recovered on the ejectment, and the execution to be executed thereon, "without paying the rent and arrears, together with the full

Stat. 4 Geo. 2, c. 28.

costs, and without filing any bill for relief in equity within *six calendar months after such execution,*" then such lessee, &c. shall be barred from all relief. By sect. 3, the lessee is, within forty days next after a full and perfect answer shall be filed by the lessor or lessors of the plaintiff, to bring into Court such sum of money as the lessors shall swear to be due, above all just allowances, and the costs taxed in the suit; and it is also provided that (in case the bills be filed after execution) the lessors shall only be accountable for what they *bonâ fide* make of the premises, and if that be less than the rent reserved, the lessee shall pay the deficiency.

FORFEITURE UNDER CONDITION, WHERE RELIEVED AGAINST IN EQUITY.

And by another provision, sect. 4, in the same statute, the proceedings even *at law* may be stayed at any time before trial, (but not *after*, *Doe* d. *Harris* v. *Masters*, 2 B. & C. 490), on payment into Court, or to the landlord, of "all the rent and arrears, together with the costs."

Proceedings may be stayed at law.

The equitable relief (for the relief *at law* is of course limited to the case provided for by the statute) has sometimes been stated as extending to all covenants, the nature of which admits of compensation; see 2 Eden's C. C. 322, 12 Ves. 476; but it is difficult to point out any other species of case, to which it can confidently be considered as applying; and as it seems now to be thought that Courts of Equity have gone sufficiently far in interferring with express contracts, by relieving against penalties incurred by the terms of those contracts, it is not probable that in future the doctrine will be *carried beyond the strict letter of the authorities. [*362] Indeed, one decision on the subject has been clearly over-ruled. In *Sanders* v. *Pope*, 12 Ves. 282, (see also *Webber* v. *Smith*, 2 Vern. 103), Lord *Erskine* relieved against a forfeiture incurred by a lessee in not expending a certain sum in repairs within a given period; but, in the teeth of this authority, the Court of Exchequer, in the late case of *Bracebridge* v. *Buckley*, 2 Price, 200, refused relief upon a similar covenant.

Extent of relief in equity as to other covenants.

It has also been expressly determined, that equity will not interfere, where the forfeiture arises from non-performance of a general covenant to repair; *Hill* v. *Barclay*, 16 Ves. 402, *S. C.* 18 Ves. 56; (see also *Davis* v. *West*, 12 Ves. 475, decided by Lord *Erskine* himself); a covenant not to assign without licence, see *Hafer* v. *Mocatto*, 9 Mod. 112; *Lovat* v. Lord *Ranelagh*, 3 Ves. & B. 31: also *Northcote* v. *Duke*, 2 Ed. 319; to cultivate the lands in a particular manner, *Lovat* v. Lord *Ranelagh*, 3 Ves. & Bea. 31; see also *Davis* v. *West*, 12 Ves. 476; to keep the premises insured, *Reynolds* v. *Pitt*, 2 Pri. 212, n.; *Rolfe* v. *Harris*, Ib. 206; *White* v. *Warner*, 2 Mer. 459; a covenant not to make a way through the premises demised, *Descarlett* v. *Dennett*, 9 Mod. 22; and lastly, not to exercise any or any particular trade therein. *Macher* v. *Foundling Hospital*, 1 Ves. & Bea. 188. In these, and such cases, therefore, the lessee must submit to the legal consequence attending the violation of his contract, though that consequence be eviction.

Cases in which relief has been refused.

CONDITION NOT TO ASSIGN OR UNDER-LET.

CONDITION NOT TO ASSIGN OR UNDER-LET.

Provisoes restrictive of alienation.

Where it is intended to prevent the lessee from parting with the premises without the consent of the lessor, which is now a frequent stipulation, the only effectual mode of accomplishing this is by giving the lessor a right of entry on alienation without consent; for a covenant merely (unless, of course, where there is a general clause authorizing re-entry on breach of the covenants), does not afford a sufficient protection against an act of this nature, which does not admit of compensation in damages.

In framing provisions against alienation, two points require attention: *First*, that they be made to embrace assignments by operation of law: and *secondly*, that they extend to under-letting as well as assigning.

It has long been held, that expressions simply restraining assignment, do not extend to assignments by operation of law.

Effect of assignment under execution.

Thus, in *Doe* d. *Mitchenson* v. *Carter*, 8 D. & E. 57, a sale by the sheriff under an execution, was held not to violate a condition that the lessee should not "let, assign, transfer, or make over," the indenture or premises: Lord *Kenyon* stating the distinction to be between acts voluntary, and acts *in invitum*: and his Lordship held, that it was not material, in reference to this distinction, that the judgment (on which the execution was issued), was signed upon a warrant of attorney, and not upon an adverse suit.

Whether bankruptcy a forfeiture.

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*So, though the validity of a provision for forfeiture on bankruptcy has been long established, (*Roe* d. *Hunter* v. *Galliers*, 2 D. & E. 133), yet it has been repeatedly determined, that a lease upon condition not to assign is not forfeited by bankruptcy, being an assignment by operation of law: and the assignees are not bound by the condition: *Goring* v. *Warner*, 7 Vin. Ab. 85, pl. 9, *S. C.* 2 Eq. Ca. Ab. 100, pl. 3; *Philpots* v. *Hoare*, Amb. 480, *S. C.* 2 Atk. 219; though in terms it extend to the lessee, his executors, administrators, *and assigns*. *Doe* d. *Goodbehere* v. *Bevan*, 3 M. & S. 353. And where, by a subsequent assignment from the assignee of the assignees, the bankrupt himself again became possessed of the lease, it was held that he was not bound by the condition. *Doe* d. *Cheere* v. *Smith*, 5 Taunt. 795.

Whether assignees in certain cases bound to give effect to equitable mortgage.

But this power of alienation, it was considered by Sir *W. Grant*, could only operate for the benefit of the creditors generally, and not of third persons: and that, therefore, the assignees were not compellable to exercise it in favour of a creditor, to whom the lessee had agreed to assign the lease as a security. *Weatherall* v. *Geering*, 12 Ves. 504. This *dictum*, however, (for the case did not call for the determination of the point), has been over-ruled by several subsequent cases. Thus, in *Ex parte Whitbread* in the matter of *Shaw*, referred to 3 M. & S. 354, where the lessee had deposited the lease, which contained a clause restrictive of alienation, as a security for money borrowed, Lord *Eldon* direct-

ed the assignees to sell for the benefit of the equitable mortgagee. See also *Ex parte Baglehole*, 1 Rose, 432; *Ex parte Sherman*, 1 Buck, 462. And these decisions, it is apprehended, are most consistent with sound principle, for there seems to be no valid reason why the creditor should not have the benefit of the transfer, by operation of law, of the legal estate, into hands which are not fettered by the restriction that bound the former owner, under whom, let it be remembered, and not by a paramount title, the assignees claim; and where the restriction only requires the consent of the lessor, *non constat* that that consent may not have been obtained; so that, if the assignees are to treat the bankrupt's contract as a nullity, the person having that contract will not only not be in a better, but will be in a worse situation than if the bankruptcy had not happened, which would clearly be wrong, upon the principle of Sir *William Grant's* own reasoning.

CONDITION NOT TO ASSIGN OR UNDER-LET.

It remains to be observed, that an assignment, which amounted to an act of bankruptcy, inasmuch as it comprehended the whole of the assignor's property, and which was subsequently avoided by a commission before any proceedings taken by the lessor, was lately held not to be a forfeiture of a condition in a lease against alienation, the effect of the bankruptcy being to avoid the deed *ab initio*. *Doe* d. *Lloyd* v. *Powell*, 5 Barn. & Cress. 312; *S. C.* 8 Dowl. & Ryl. 35.

An assignment, subsequently avoided by bankruptcy, no forfeiture.

*The depositing the lease, as a security for money advanced, has also been decided not to be a breach of a condition, that the lessee should not under-let, or "alien, sell, assign, transfer, and set over, or *otherwise part with the lease* or premises, without the licence of the lessor." *Doe* d. *Pitt* v. *Hogg*, 2 Carr. & Payne, N. P. Cas. 160. See also *Doe* d. *Goodbehere* v. *Bevan*, 3 Mau. & Selw. 353.

Deposit, by way of security, no forfeiture.

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That clauses, restrictive of alienation generally, do not extend to underleases, has been determined in several cases. Thus, where the lessee was not to "assign, transfer, or set over, or otherwise do or put away" the lease or premises, an under-lease was held to be no breach of the proviso. *Crusoe* d. *Bleacoe* v. *Bugby*, Blackst. 766; *S. C.* 3 Wils. 234. See also *Kinnersley* v. *Orpe*, Doug. 58; 15 Ves. 265. But *contra*, where the condition was not to "*set, let*, or assign over" the premises. *Roe* d. *Gregson* v. *Harrison*, 2 D. & E. 425. So, a proviso for re-entry, if the lessee, his executors or administrators, assigned or otherwise parted with the lease or premises *for the whole or any part of the* term, was held to be broken by an under-lease. *Doe* d. *Holland* v. *Worsley*, 1 Camp. 20.

Whether restrictions on alienation extend to *under-leases*.

The converse of the proposition is equally true, namely, that a restriction on under-letting is not broken by an assignment; and this distinction is by no means unreasonable, for, as an assignee subjects himself to the lessee's covenants, which run with the land, and an under-lessee does not, a lessor may choose to restrain the latter species of alienation only. But a covenant not to let, set, or demise the premises *for the whole or* any

Whether restrictions on underletting extend to assignments.

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part of the term, has been held to extend to an assignment. *Greenaway* v. *Adams*, 12 Ves. 395.

As to taking lodgers.

And here, it may be observed, a restriction on under-letting does not prevent the lessee from taking lodgers. Thus, where a lessee covenanted not to "grant any under-lease or leases, for any term or terms whatsoever, or let, assign, transfer, set over, or otherwise part with the said messuage or tenement and premises, or his or their term or interest, by the said indenture granted, or intended so to be, or any part thereof," without the consent of the lessor, it was held that this was not broken by the lessee admitting a lodger into the exclusive possession of a room for upwards of a twelvemonth. Lord *Ellenborough* ridiculed the idea of the lessee applying for a licence to take in a lodger. *Doe* d. *Pitt* v. *Laming*, 4 Campb. 77.

Condition broken by letting to partner, though without rent.

But, where a lessee, who was "not to demise, lease, grant, or let the demised premises, or any part or parcel thereof, for all or any part of the term," without licence, agreed with A., with whom he entered into partnership, that he should have the use of some parts of the premises exclusively, and the rest jointly with the lessee, and which premises he was to deliver up on having three months' notice; and he was accordingly let into possession, it was held that this was a breach of the proviso, and that the fact, that no rent was reserved, was not material. *Roe* d. *Dingley* v. [*365] *Sales*, 1 M. & S. 297. It is clear, that the advertising the premises to be let, is no breach of a proviso not to under-let. *Gourlay* v. Duke of *Somerset*, 1 Ves. & Bea. 68.

Whether condition not to alien is broken by a bequest.

Whether a covenant not to alien is broken by a *bequest* of the property, seems to have been *vexata quæstio* at an early period. In *Berry* v. *Taunton*, Cro. El. 331, a condition not to "*demise*" was adjudged to be broken by a devise; and in *Dumper* v. *Syms*, Ib. 816, a proviso not to "alien" received a similar construction. But in *Fox* v. *Swann*, Sty. 483, it is laid down that a devise is not a breach of a covenant not to assign, and it is probable that the doctrine of the latter case would now be followed: for since the lessee might clearly cause the premises to devolve upon whom he pleased, by appointing him an executor, and a bequest, whether general or specific, is nothing more than the imposition of a trust upon the legal representative, subject to debts, it seems to be difficult to say, that it cannot be bequeathed. At all events, where the condition is not to "demise," as in *Berry* v. *Taunton*, it would clearly not now be held to be broken by a testamentary disposition. The construction of the condition adopted in that case, indeed, forms a singular contrast to the jealousy with which Courts of law are said to regard these restrictions on alienation, and indeed all provisions for forfeiture. See 15 Ves. 265; also 2 Ed. 321. In *Dumper* v. *Syms* the legatee was appointed executor, and *Gawdy*, J., thought that his entry must be considered to be made as legatee, there being, it is said, no debts.

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But a condition not to *devise*, except to certain persons, is clearly broken by bequeathing to other persons, though the executor do not assent to the bequest. *Barton* v. *Horton*, 1 Roll. Ab. 428, (V), pl. 1. And it is even said, that an express bequest to an executor for payment of debts, is a forfeiture. *Barton* and *Horton's case*, 1 Roll. Ab. 428, pl. 1.

Exception as to certain persons.

Whether such persons bound by the restriction.

Sometimes the restriction on assigning is qualified by an exception as to certain persons, which raises the question, whether they are comprehended in the restriction. In *Whitchcot* v. *Fox*, Cro. Jac. 398, a lessee covenanted that he would not alien or assign the term, or any part thereof, to any other but to his wife, during her life, and the residue of the term to her children, *or one of his youngest brethren*, upon pain of forfeiture. He assigned to his brother; and the Court held that the condition did not extend to the brother, *who might alien to whom he pleased.*

But in *Anon.* Dy. 152 a, where the lease provided, that neither the lessee nor his executors or *assigns*, should alien or grant over the term to any person or persons, without the licence of the lessor, but to the wife, or to one of the children of the lessee, and the lessee dying, his executors granted the term to one of the sons; three of the Judges against two thought that the son could *not* assign to a stranger without licence.

This case has generally been thought to contradict *Whitchcot* v. *Fox*; *but it is observable, that, in the former case, the restriction expressly extended to the *assigns;* and in the late case of *Lloyd* v. *Crispe*, 5 Taunt. 249, where a power of re-entry was reserved to the lessor, on breach of the lessee's covenants, and one of those covenants was, that he, his *executors, administrators,* OR ASSIGNS, " should not nor would assign over, or otherwise part with the lease or premises to any person or persons whomsoever, except by his or their last will and testament, without the licence of the lessor, his heirs, or assigns:" the Court assumed (though the case did not directly raise the point) that the assignee of the lessee's executors was *not* released from the necessity of obtaining the lessor's licence. Unless the distinction suggested can be sustained, these cases must be considered to have shaken *Whitchcot* v. *Fox*.

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As to naming *assigns* in the condition.

It is laid down, in an early case, that the extension of the condition against alienation without consent, to *assigns*, is repugnant; but the answer now given to this objection is, that it imports such assignees as the lessee may lawfully have, namely, assignees with consent, or assignees by operation of law (assuming the restriction to be so framed as not to embrace the latter). But as we have seen that the term is totally inoperative *per se*, to bring either of these classes of assignees within the operation of the condition, the word 'assigns' might seem to be incorrect and nugatory, because, as we shall presently see, the lessee cannot have assignees by licence, without destroying the condition. The correctness of the use of the word, however, would be established by shewing *any* case in which the lease might get into the hands of an assignee, clogged with

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the condition; and such case, it will appear, does exist. See *Doe* v. *Bliss*, 4 Taunt. 735, *post*, p. 367. Executors and administrators are also assignees in law; but these are generally expressly named.

Whether condition extends to executors or administrators.

Where the condition, in terms, extends to executors or administrators, an assignment by them is of course a forfeiture; *Roe* d. *Gregson* v. *Harrison*, 2 D. & E. 425; *Lloyd* v. *Crispe*, 5 Taunt. 249; but it has sometimes been thought, that where they are not named, they are not bound. Dy. 66 a. See Lord *Thurlow's* judgment in *Seers* v. *Hind*, 1 Ves. Jun. 295; also, 1 D. & E. 425. Indeed, Lord *Mansfield* denied that such a restriction could be imposed upon executors, on account of its inconsistency with their trust, which necessarily involves the disposition and conversion of the property; but this has been overruled. It has been truly said, (8 D. & E. 61), that, in propounding this doctrine, his Lordship overlooked the maxim, *modus et conventio vincunt legem.*

Licence to assign discharges condition.

The well-known doctrine, that a licence once given discharges the condition, and enables the assignee and those claiming under him to make future assignments *ad infinitum*, has been shewn at large in another place, *vide ante*, p. 55 (*a*), and see *Dumpor's case*, 4 Rep. 119 b; *S. C.* nom. *Dumper* v. *Symms*, Cro. El. 815; *Jones* v. *Jones*, 12 Ves. 186. It will, therefore, [*367] *be sufficient here to advert briefly to a few of the points: The rule has been held to apply, though the licence be particular and restrictive in its terms, and the condition expressly extends to the lessee, his executors, administrators, *and assigns*. See *Brummel* v. *Macpherson*, 14 Ves. 173. So, a licence, in respect of *part* of the land, is a dispensation with the condition as to the whole land; *Dumper's case*, 1 Roll. Ab. 475, (G) pl. 2; and to *one* of *several* lessees, in respect of *all* of them. *Leeds* v. *Crompton*, Ib. 472, pl. 7.

The doctrine which prohibits a partial dispensation with provisions of this nature, has been much disapproved, (see 14 Ves. 176; 4 Taunt. 736; 1 Ves. & Bea. 191); but it is too well established now to be shaken. It is founded on the notion of the entire indivisible nature of conditions, and to them, therefore, is exclusively applicable, (see *Collins* v. *Sillye*, Sty. 265); though it has been sometimes inaccurately treated, even by respectable writers, as applying indiscriminately to both conditions *and covenants*. See Comyn's *Land. & Ten.* 218. Restraints on alienation, however, are generally imposed by way of proviso, authorizing the lessor to re-enter on this particular act, or on breach of the covenants generally, of which this is one. *Lloyd* v. *Crispe*, 5 Taunt. 249.

Lessor may, by *acts*, dispense

The disapprobation with which the doctrine of *Dumper's case* has been viewed, has induced the Courts not to carry it further; and, accordingly,

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(*a*) See some observations on the *principle* of this doctrine, *ante*, p. 59.

though it is clear that the acceptance of rent from the assignee, (*Whitchcot* v. *Fox*, Cro. Jac. 398; *Lloyd* v. *Crispe*, 5 Taunt. 249; see also Sty. 483, 2 Atk. 220, Doug. 57); or from the lessee, (*Goodright* d. *Walter* v. *Davids*, Cowp. 803, which seems to overrule *Marsh* v. *Curteys*, Cro. El. 528; see also *Doe* d. *Boscawen* v. *Bliss*, 4 Taunt. 735, if the lessor accepted it with a knowledge of the assignment or under-letting, (see *Pennant's case*, 3 Rep. 64; *Roe* d. *Gregson* v. *Harrison*, 2 D. & E. 424; *Harvey* v. *Oswald*, Cro. El. 553, 572), precludes the lessor from taking advantage of the breach, *pro hâc vice*, of the condition; yet it has been held not to be a total dispensation with the condition, so as to prevent him from proceeding for a forfeiture incurred by a subsequent under-letting to another person. *Doe* d. *Boscawen* v. *Bliss*, 4 Taunt. 735.

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with the condition, partially.

Where the licence to assign is required to be in writing, a parol licence is clearly inoperative. *Doe* d. *Gregson* v. *Harrison*, 2 D. & E. 425. And such a licence is not sufficient in equity any more than at law, unless used as a snare, under circumstances which amount to a fraud. *Richardson* v. *Evans*, 3 Madd. 218.

As to licence by parol.

It may be observed, that a licence is not affected by the death of the lessor, Co. Litt. 52. b., or by his having aliened the reversion before the assignment by the lessee. *Walker* v. *Ballamie*, Cro. Jac. 102.

Death of lessor, &c.

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VII. COVENANTS:—THEIR CONSTRUCTION; EFFECT OF PARTICULAR COVENANTS; COVENANT BY LESSOR FOR QUIET ENJOYMENT; TO RENEW—BY LESSEE TO REPAIR; PAY TAXES, &C.—WHO BOUND BY, AND WHO MAY TAKE ADVANTAGE OF COVENANTS, AND HEREIN AS TO WHAT COVENANTS RUN WITH THE LAND; EFFECT OF ASSIGNMENT, BANKRUPTCY, &C.—LIABILITY OF EXECUTORS AND ADMINISTRATORS OF LESSEES.—WHERE COVENANTS ARE DEPENDENT, AND WHERE NOT; AND AS TO THE RIGHT OF SET-OFF.

CONSTRUCTION OF COVENANTS.

CONSTRUCTION OF COVENANTS.

Although, in preparing covenants, it is prudent to adhere to the forms which long practice has sanctioned, yet the student should be apprised that such forms are by no means essential to their efficacy. It is enough that the intention of the parties is apparent, and the most informal expressions, from which that intention can be collected, have been held to be sufficient for the purpose. Where persons, therefore, in an instrument under hand and *seal*, engage or "agree" (without the word *covenant*) to do an act, this amounts to a covenant; *Pordage* v. *Cole*, 1 Wms.'s Saund. 319; and even where there are no direct conventional expressions, but the instrument contains an indication that the act shall be done, an action of covenant may be maintained. Thus, where a deed recites that it is "intended" that an act shall be done, this amounts to a covenant to

Covenants held to be created by informal expressions.

CONSTRUCTION OF COVENANTS.

do it. See *Holles* v. *Carr*, 3 Swanst. 648; *Sampson* v. *Easterby*, 9 Barn. & Cress. 505. So, the words "and the lessee shall repair the mills as often as need shall require, and shall leave them sufficiently repaired at the end of the term," constitute a covenant. *Brett* v. *Cumberland*, 1 Roll. Abr. 518, (C) pl. 1.

If a lease be granted to B. *on condition* that he shall acquit the lessor of charges, ordinary and extraordinary, and shall keep and leave the houses at the end of the term in as good a plight as he found them: and he does not leave them in good repair at the end of the term, an action of covenant will lie. 1 Roll. Abr. 518, (C) pl. 5.

Again, (in a case which is often cited), where a lessee covenanted to plough, sow, manure, and cultivate the demised premises (*except the rabbit-warren and sheep-walk*) in a due course of husbandry; it was held, that an action of covenant was maintainable against him for ploughing the sheep-walk; Lord *Ellenborough* observing, "*by whatever words we collect an agreement that the thing should not be done, we collect enough to make an action of covenant maintainable for the doing it.*" Duke of *St. Albans* v. *Ellis*, 16 East, 352.

So, in a late case, a covenant by a lessee to pen and fold his flock of sheep, which he should keep upon the demised premises, upon such parts where the same had been usually folded, was considered to amount, by
[*369] *implication, to a covenant to keep a flock of sheep. *Webb* v. *Plummer*, 2 Barn. & Ald. 746. See also *Randall* v. *Lynch*, 12 East, 179.

Actions, too, may be maintained for the breach of quiet enjoyment upon the words of the demise, and for the rent upon the *reddendum;* 1 Roll. Ab. 519, pl. 10; *Giles* v. *Hooper*, Carth. 135; but, though these have been sometimes ranked among express covenants inartificially expressed, *Porter* v. *Sweetnam*, Sty. 406, 431, yet it may be doubted whether they are not rather to be regarded as covenants in law, or, in other words, as covenants which the law implies from certain expressions, independently of intention, and not as words declaratory of the intention of the parties. Unless some distinction of this kind can be drawn between them, it is difficult to see the ground for the doctrine, that a lessee is discharged, by an assignment, (*vide post*), (the lessor having accepted the assignee as his tenant), from his obligation to pay rent under the *reddendum*, but not from an express covenant; for, if both are express covenants by the party, though one is more formally expressed than the other, there seems to be no solid reason for placing them upon a different footing in reference to the effect of an assignment. Indeed, the doctrine, that an action of covenant will lie upon any informal expressions denoting the intention of the parties, and that there is no distinction between the legal effect of such a covenant and one framed in formal and technical terms, seems not to have been invariably kept in view.

As to covenants arising by implication of law.

Thus, in a late case, *Burnett* v. *Lynch*, 5 B. & C. 589, stated *ante*, p.

311, it was held, that, where a lease was assigned to a person *under and subject to the payment of the rents thereby reserved, and to the performance of the covenants therein contained on the part of the lessee to be performed,* an action on the case might be maintained against the assignee for neglecting to perform the covenants, whereby the assignor sustained damage. Now, this decision could only have been made on the ground, that these words did not contain a covenant on the part of the assignee to perform the covenants; for it is well settled that an action cannot be maintained on an implied contract, when there is an express contract on the subject. *Randall* v. *Lynch*, 12 East, 179. And, therefore, in a late case, *Schenckler* v. *Moxsy*, 5 B. & C. 789, where a lessee under-let premises by deed, and covenanted for the quiet enjoyment, it was held that the sub-lessee could not maintain an action on the case against his lessor, in consequence of his having been distrained on for rent by the superior landlord, inasmuch as the parties had entered into an express contract by deed; for it was observed, if the plaintiffs were interrupted in the quiet enjoyment of the premises, covenant would lie on the demise (*a*). Com. Dig. "*Covenant*," (A 4). The Court, however, seems to have overlooked that the lease contained an express covenant for quiet possession, which, on their own doctrine, *superseded the implied covenant arising on the words of demise. Whether the covenant for quiet enjoyment, however, extended to the incumbrance in question does not appear, but most probably it did. The result, therefore, is, that from such expressions as those that occurred in *Burnett* v. *Lynch*, a covenant to perform the covenants in the lease was not considered to arise.

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In preparing a covenant entered into with several persons, it should be made distinctly apparent whether it is intended to be a separate covenant with each covenantee, as well as a joint covenant with the whole; though it has been held, that if the interest of covenantees be several, they may maintain several actions, notwithstanding that the language of the covenant be that of a joint covenant. *James* v. *Emery*, 8 Taunt. 245; *S. C.* 2 J. B. Moore, 195; 5 Price, 529; *Withers* v. *Birchman*, 5 Dowl. & Ryl. 106; *S. C.* 3 B. & C. 254. But see *Anderson* v. *Martindale*, 1 East, 497.

As to joint and several covenants.

In a late case, where it appeared that, by indenture made between J. S., tenant for life, of the first part; T. C., receiver appointed by the Court of Chancery, of the second part; and the defendant, of the third part; J. S. demised certain lands to the defendant for sixteen years. And the defendant covenanted with T. C., and other the receiver or receivers for

Question, whether the words "and every of them" made a several covenant.

(*a*) The Court, therefore, considered that the covenant contained in, or resulting from, the words of the demise excluded an implied contract.

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the time being [and the said J. S. (*a*)], and to and with such other person or persons as for the time being should be entitled to the freehold or reversion, *and to and with every of them*, to repair, and not to suffer cattle to feed on the coppice. J. S. died, and his executor, in the life-time of T. C., brought an action on this covenant, to which the defendant pleaded that the covenant was joint; and of this opinion was the Court. "It is urged," said Sir *J. Mansfield*, "that 'to and with every of them,' means with each of the two separately; but it would be very strange if it were so; it means with every of the receivers, and the persons entitled, jointly: and certainly it is important that the action should not be brought by a representative, who pays no costs, but by some one who is liable to costs." *Southcote* v. *Hoare*, 3 Taunt. 87. See further as to the construction of covenants, Com. Dig. tit. "*Covenant*," (A 2); 1 Selw. N. P. 449; Com. *Land. & Ten.* 158; and the cases cited in Lady *Saltoun* v. *Houston*, 8 J. B. Moore, 546; *S. C.* 1 Bingh. 443.

Where there are joint covenantees, they must all be joined in the action, though all have not executed, unless it be shewn that they have disclaimed. *Petrie* v. *Bury*, 5 Dowl. & Ryl. 152; *S. C.* 3 Barn. & Cress. 353.

Covenants cannot be discharged unless by deed.

Finally, it may be observed, in regard to covenants, that they cannot be discharged before breach, otherwise than by deed; and, therefore, a parol licence or agreement, dispensing with or changing the terms of such obligation, cannot be pleaded in bar to an action on the covenant. *Littler* v. *Holland*, 3 D. & E. 592; *Heard* v. *Wadham*, 1 East, 619; *White* v. *Parkin*, 12 East, 583; *Thomson* v. *Brown*, 1 J. B. Moore, 358; *Sellers* v. *Bickford*, Ib. 460; *Cordwent* v. *Hunt*, 2 Ib. 660; which have overruled *Hotham* v. *East India Company*, 1 Doug. 272.

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COVENANT FOR QUIET ENJOYMENT.

Implied warranty of title.

In every demise, whether by deed or parol, the law creates an implied warranty of the title on the part of the lessor, extending to the claims of all persons. And it has long been held, that an action of covenant will lie upon the words of demise in a lease, without any more explicit covenant for quiet enjoyment. *Style* v. *Hearing*, Cro. Jac. 73; 4 Rep. 80, 5 Rep. 17; *Tisdale* v. *Essex*, Hob. 34; see also 9 Ves. 330. Upon the same principle, an action of covenant has been maintained by the lessor against the lessee for the interruption of a way which was reserved to him through the demised premises, upon the mere words of reservation. *Bush* v. *Calis*, 1 Show. 388.

The implied warranty, however, only arises where the *legal* relation of landlord and tenant subsists; and it has been decided not to be created by a mere agreement for a lease. *Gwillim* v. *Stone*, 3 Taunt. 433.

(*a*) These words are not in the report, but seem to be necessary to the sense.

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Controlled by express covenant for quiet enjoyment.

And, in leases, the warranty resulting by implication of law from the words of the demise, may be, and usually is, superseded by an express covenant for title and quiet enjoyment, agreeably to the rule *expressum facit tacitum cessare; Nokes's case*, 4 Rep. 80; see also *Gervis* v. *Peade*, Cro. El. 615; *Broughton* v. *Conway*, Dy. 240 a; *Brown* v. *Brown*, 1 Lev. 57; *Mervill* v. *Frame*, 4 Taunt. 329; and as such covenants are commonly confined to the acts of persons claiming under the lessor, they operate in favour of the lessor, by narrowing the liability which would, by the rule of law, attach to him in the absence of such express covenant. Considering that a lessee is rarely acquainted with the lessor's title, and that he is *never* furnished with the means of defending it, (the deeds being invariably left in the custody of the lessor), the rule, which obliges him to accept of restricted covenants, seems to be hardly consistent with the strictest principles of justice between the parties. Where a lessee pays a premium, or contemplates the expenditure of money in improvements upon the property, he should never fail to make it the subject of express stipulation, that the enjoyment shall be absolutely warranted to him, especially if the lessor's title be not disclosed.

Whether warranty or covenant extend to wrongful evictions.

The warranty resulting by implication of law from a demise is confined to lawful, and does not extend to wrongful claims and evictions; *Tisdale* v. *Essex*, Hob. 34; and the same rule has long been decided, in opposition to some of the early cases, (*Mountford* v. *Catesby*, Dy. 328 a; *Tisdale* v. *Essex*, Moor. 861, pl. 1183; *Anon.* Str. 67), to apply to express covenants, (*Brocking* v. *Cham*, Cro. Jac. 425; *Hamond* v. *Dod*, Cro. Car. 5; *Major* v. *Grigg*, 2 Mod. 213; *Dudley* v. *Folliott*, 3 D. & E. 584; *Foster* v. *Pierson*, 4 Id. 617; see also *Tisdale* v. *Essex*, Hob. 34), whether such covenants be general, extending to all persons, or be confined to the acts of the persons claiming under the lessor; *Hayes* v. *Bickerstaff*, Vaugh. 118; and though the covenant expressly refer to any particular species of incumbrances, as tithes. *Lanning* v. *Lovering*, Cro. El. 916.

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But a contrary rule prevails where the covenants apply to the claims of a designated individual, these being held to include as well the wrongful as the rightful acts of such person. *Nash* v. *Palmer*, 5 M. & S. 374; see also *Foster* v. *Mapes*, Cro. El. 212; *S. C.* nom. *Wilson* v. *Mapescit*, Hob. 35; *Perry* v. *Edwards*, 1 Stra. 400; *Southgate* v. *Chaplin*, Com. 230; *Lloyd* v. *Tomkies*, 1 D. & E. 671; *Fowle* v. *Welsh*, 1 Barn. & Cress. 29; *S. C.* 2 D. & R. 133. And where the lessor is himself the disturber, an action may be maintained on his covenant, though it be general in its terms, and his disturbance wrongful, (*Corus* v. ———, Cro. El. 544); *à fortiori*, where his covenant expressly and exclusively refers to his own acts. *Penning* v. *Platt*, Cro. Jac. 383.

Construction of covenant for quiet enjoyment.

It was lately held, where a person, on his marriage, limited lands to himself for life, with remainder to his sons in strict settlement, reserving to himself a power of leasing, and then granted a lease, covenanting for

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the quiet enjoyment against persons claiming under him or any of his ancestors—that the lessee, being evicted by the tenant in tail in remainder, in consequence of the lease not being granted according to the power, this eviction came within the terms of the covenant. *Evans* v. *Vaughan*, 4 Barn. & Cress. 261; *S. C.* 6 D. & R. 349; see also *Hurd* v. *Fletcher*, Doug. 243. It was attempted to be argued, in this case, that the covenant being for quiet enjoyment *during the term*, and the term having, in fact, ceased on the death of the tenant for life, the covenant was at an end; but the Court held, that, according to the obvious intention of the parties, the covenant was to be construed as extending to the term *purported* to be granted, and not merely to the actual continuance of the estate.

It has been decided, however, that the non-disclosure, by a lessor granting an under-lease, of a condition contained in the original lease, giving the lessor a right of entry if the premises were used as a shop, and which the sub-lessee violated in ignorance of the prohibition, and was evicted, was no breach of the sub-lessor's covenant for quiet enjoyment, which was limited to the acts of persons claiming under him, or through his or their acts, *means*, right, title, forfeiture, privity, or procurance. *Spencer* v. *Marriott*, 1 Barn. & Cress. 457; *S. C.* 2 D. & R. 665.

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COVENANT FOR THE RENEWAL OF THE LEASE.

Covenants for renewal, how construed.

In framing and construing covenants for renewal, one of the first points suggested to our attention is, whether the renewed lease is or is not to contain a similar covenant; or, in other words, whether the right of renewal is to be perpetual, or *pro hâc vice* only; for, as the covenant of renewal to be inserted in the renewed lease must be executed in the same manner, it is obvious, that the introduction of such a covenant in the next lease involves a right of renewal for ever. The leaning of the Courts, however, is against perpetual renewals; and therefore, in order to establish this construction, the intention must be unequivocally expressed; and a pro-

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*viso, in general terms, that the lease to be granted shall contain the same covenants and agreements as the lease containing the covenant, has been repeatedly held not to extend to the covenant for renewal. *Russell* v. *Darwin*, 2 B. C. C. 639, n.; *Tritton* v. *Foote*, Ib. 636; see also *Hyde* v. *Skinner*, 2 P. W. 196.

Whether renewed lease to contain covenant for renewal.

Upon this principle, in a late case, it was held, that a covenant to grant a new lease, "with all covenants, grants, and articles, in this indenture contained," was satisfied by the tender of a new lease, containing all the former covenants, except the covenant for further renewal. *Iggulden* v. *May*, 7 East, 237; *S. C.* 2 New Rep. 449, 9 Ves. 315; see also *Moore* v. *Foley*, 6 Ves. 232; *Dowling* v. *Mill*, 1 Madd. 541.

But where the covenant was to grant such further lease as should be desired by the lessee, under the same rents and covenants, it was held,

that the lease might contain such a covenant; *Bridges* v. *Hitchcock*, 5 B. P. C. Toml. ed., 6; and a similar construction has been given to a covenant to execute "one or more leases, under the same rents and covenants as are expressed in these presents, *and so to continue the renewing of such lease or leases*" to the lessee and his assigns. *Furnival* v. *Crewe*, 3 Atk. 83. COVENANT FOR RENEWAL.

Where a lease contains a clear covenant for perpetual renewal, equity will decree a specific performance, (*Furnival* v. *Crewe*, 3 Atk. 83; and see *Iggulden* v. *May*, 9 Ves. 331; City of *London* v. *Nutford*, 14 Ves. 52), though Lord *Thurlow* thought the contract so unreasonable, that it ought never to be executed; but the notion is now deservedly exploded. See *Willan* v. *Willan*, 16 Ves. 84.

It is a common practice with some corporations to renew their leases without any covenant, and this custom of renewal enhances the value of the lessee's interest; but such a custom, however old, or frequently acted upon, confers no right to a renewal. The Court of King's Bench, indeed, during the period that Lord *Mansfield* presided over it, advanced a contrary doctrine in the case of *Cooke* v. *Booth*, Cowp. 819; but the authority of the case has been frequently denied, (see *Baynham* v. *Guy's Hospital*, 3 Ves. 298; *Eaton* v. *Lyon*, Ib. 694; *Iggulden* v. *May*, 9 Ves. 331, 333), and is clearly over-ruled. In Ireland the case is different; but the tenant's right of renewal forms a distinct and well-known branch of the law of landlord and tenant peculiarly applicable to that country, being founded on the provisions of a particular act of Parliament. See stat. 19 & 20 Geo. 3, c. 30. The law relating to this subject will be found in Chambers on Landlord and Tenant. No obligation arises from practice to renew.

Another point to be attended to in covenants for renewal, is, to define with precision the period and terms for and upon which the renewal is to be granted. Disputes often arise between the lessor and lessee, whether, upon the true construction of the covenant to renew in a lease for lives, the lessee is obliged to renew at the dropping of *each* life, or has the liberty of *waiting until the expiration of all the lives. The construction of the covenant in such cases has generally been against the lessee. Covenants for renewal should clearly define the terms of renewal. [*374]

Thus, in *Baynham* v. *Guy's Hospital*, 3 Ves. 295, where, in a lease for three lives, the lessor covenanted, within two years from the death of "the *first* or *any* or *either* of the life or lives," to make a renewed lease, "*to commence from the expiration of these presents*," provided the fine were tendered within two years after the "decease of *any* or *either* of the life or lives theretofore in being, and so dying as aforesaid, and as often as *one* life, whereby the said demised premises shall be held and enjoyed, shall die and depart this life:" Sir *R. P. Arden*, M. R. held, that the lessee was bound to renew within two years after the decease of the first life. Whether lessee, in a lease for lives, bound to renew at the dropping of first life.

So, in *Eaton* v. *Lyon*, 3 Ves. 690, where, in a lease for three lives, the Word "any"

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how construed in covenant for renewal.

lessee covenanted within six months after the decease of "*any*" of the lives to take a renewed lease, and add therein one or two life or lives to the life or lives then in being, as the case should require; and the lessor covenanted to grant a new lease upon these terms: the same learned Judge held, that, by the omission to renew within six months after the dropping of the first life, the right of renewal was forfeited. In this case much criticism occurred upon the word *any*, which, the lessee contended, was, in its grammatical signification, plural; but the Master of the Rolls was of opinion that it was singular or plural according to the context, and was in this case evidently used in the former sense. It may be observed, that the reference to the plurality of lives, to be inserted in the new lease, on which the lessee generally rests *his* construction of the covenant in these cases, is easily susceptible of explanation, by supposing that it is intended to provide for the event of a second or third life lapsing within the period allowed for renewal after the death of the first.

Effect of non-renewal within the period allowed by the covenant.

Where a lessee neglects to renew within the time prescribed by the covenant, the right of renewal is gone, as well in leases for years as leases for lives. Thus, where, in a lease for sixty-one years, the lessor covenanted with the lessee, within one year after the expiration of twenty years of the said term of sixty years, on the request and at the costs of the lessee, his executors, &c. and at a certain fine, to grant a further lease for twenty years, to commence after the expiration of the term of sixty-one years, and *so in like manner* at the end of every twenty years during the term, to grant another lease of twenty-one years, to commence at the expiration of the lease then last before granted; it was held, that the lessee was bound to apply for the renewal at the expiration of the *first* twenty-one years, and by default had lost the benefit of the covenant. *Rubery* v. *Jervoise*, 1 D. & E. 229.

No relief in equity.

And equity, it is clear, will not relieve a lessee from the consequence of his laches, in not applying for a renewal within the prescribed period. Thus, where the lessor covenanted to renew, on request, within three

[*375] *months before the expiration of the lease then granted, the lease being within a month of expiring, and the lessee not having applied for a renewal, the lessor agreed to lease the premises to other persons. The lessee then filed a bill for a new lease, but the Lord Chancellor dismissed the bill, observing, that if the lessee were relievable in such a case, he knew not where the Court could stop. It would be saying that the lessee should be loose, and the lessor bound. *Allen* v. *Hilton*, 1 Fonbl. Treat. Eq. 432. The subject of demise in this case was a colliery, which has been considered as strengthening the case, since it was important that the lessor should know, three months before the expiration of the lease, whether the lessee would continue or not; see Lord *Eldon's* judgment in *City of London* v. *Mitford*, 14 Ves. 58, but though the Lord Chancellor adverted to this circumstance, he is said to have decided the case upon the general principle. 1 Fonb. Treat. Eq. 433.

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So, in another case, where a lessee, who was entitled to renew within six months after the decease of either of the lives, neglected to do so, and allowed the second life to drop, and then filed a bill, offering to pay the renewal fines with interest, Lord *Thurlow* dismissed the bill. *Bayley* v. Corporation of *Leominster*, 3 B. C. C. 529. See also *Bateman* v. *Murray*, 5 B. P. C. Toml. ed. 20.

Cases, indeed, may exist to call for the extraordinary interference of the Court in granting the relief in question. Thus, it has been laid down by a high authority, that "if by unavoidable accident, by fraud, by surprise, by ignorance, not wilful, parties have been prevented from executing the covenant literally, a Court of equity will interfere, and, upon compensation being made, *the party having done every thing in his power*, and being prevented by the means alluded to, will give relief." *Per* Sir *R. P. Arden*, M. R., *Eaton* v. *Lyon*, 3 Ves. 693. See also *Bateman* v. *Murray*, cit. 4 B. C. C. 417.

Ignorance of the dropping of the life no excuse for non-renewal.

But the mere fact, that the lessee or his assignee was ignorant of the event of the death of the *cestui que vie* (*a*), does not excuse his neglect to renew at the proper time.

And, therefore, in a case just decided at the Rolls, where it appeared that the assignee of the lease did not know of the death of the *cestui que vie*, and accounted for his ignorance, on the ground that the description in the lease of the residence and trade of the person did not correspond with his actual residence and trade at the time of his decease; and therefore, though he (the owner of the lease), knew of the death of this person, he was mistaken as to his identity; and immediately upon his receiving information upon the subject, applied for a renewal: Sir *J. Leach*, M. R., thought that these circumstances did not entitle the plaintiff to relief in equity; and, upon the general principle, that a lessee was bound to inform himself who the lives were, and apply within the prescribed period, his Honour dismissed the bill, observing, (in allusion to Lord *Alvanley's dictum* in *Eaton* v. *Lyon*, which had been much pressed upon him in favour of the *lessee), that this was a case of "wilful ignorance." [*376] *Harris* v. *Bryant*, Rolls, 10 Decr. 1827, MS. now reported 4 Russ. 89.

In one case, indeed, *Rawstorne* v. *Bentley*, 4 B. C. C. 415, Lord *Alvanley*, when at the Rolls, relieved a lessee whose neglect to apply for a renewal seemed hardly to be excused by any circumstances that would bring it within the principle stated by his Lordship in *Baynham* v. *Guy's Hospital;* but the case was peculiar. The covenant was in a twenty-one years' lease of a copyhold, (which could, by the custom, be leased for twenty-one years only), and the lessor was, before the end of the term, to

(*a*) Under statute 6 Ann. c. 18, a lessee *pur auter vie* may, on motion *ex parte*, supported by affidavit, be compelled to produce the persons on whose lives the lands are held. *Ex parte Whalley*, 4 Russell, 561.

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renew the lease for twenty-one years, and so on at the end of such term for twenty-one years, and twenty-one years, and fifteen years, making in all ninety-nine years; and the Master of the Rolls considered that it was substantially to be regarded as a lease for ninety-nine years. It is to be observed, that *no act was to be done on the part of the lessee; no fine was payable, nor was even a request required to be made.* The case may, therefore, be regarded as *sui generis.*

Whether any distinction between leases for years and lives, in regard to neglect to renew.

It should be observed, before we dismiss the subject, that a respectable writer has stated (Chambers's *Land. & Ten.* 232), that, in the case of a lease for years, as distinguished from leases for lives, the request for renewal does not seem to be the essence of the contract. The only authority for this distinction seems to consist in an observation rather indistinctly thrown out by Lord *Eldon*, in the conclusion of his judgment in the case of the *City of London* v. *Mitford*, 14 Ves. 58; and it is difficult to perceive any solid grounds upon which it rests, or that it can be supported upon the general doctrine, particularly of the modern authorities.

Whether right of renewal runs with the lease, or is personal to the lessee.

Another question arising on covenants for renewal, and which requires to be attended to in framing them is, whether they are to be executed in favour of the person for the time being entitled to the lease, or are personal to the lessee.

The former construction is undoubtedly the most reasonable, and the Courts would, it is conceived, require a clear and rather special demonstration of intention to confine it to the lessee. In *Hide* v. *Skinner*, 2 P. W. 196, Lord *Macclesfield* held, that a covenant to renew at the request of the lessee extended to his executors, the executors of every person being "implied in himself." See also *Chapman* v. *Dalton*, Plow. 284; *Constable's case*, cit. Cro. Car. 289.

It has been held, however, in several early cases, that the assignees of a bankrupt are not entitled to the execution of a covenant for renewal entered into with the bankrupt; *Drake* v. Mayor of *Exeter*, 2 Freem. 183; *S. C.* 1 Ch. Cas. 71; *S. C.* cit. 2 Vern. 97; *Finch* v. Earl of *Salisbury*, Finch Rep. 212; but the reason for excepting any particular class of assignees, provided they will enter into the lessee's covenants, (which persons standing in the character of bankrupt's assignees would in general be disinclined to do), is not very apparent. The difficulty, however, may be, and generally is, avoided by the assignees disposing of the lease, and

[*377] *with it the benefit of the covenant. Indeed, the position that assignees are not entitled to the benefit of a covenant for renewal, may now, it is conceived, be considered as over-ruled by the late bankrupt statutes; for, in allowing to assignees the option of adopting a lease, they impliedly give them the benefit of all the covenants in it, including that of renewal. The doctrine, however, of the early cases, is stated by Mr. Comyn as still being the rule of law on this subject. See Com. *Land. & Ten.* 488.

COVENANT TO REPAIR.

The relation of landlord and tenant, whether created by deed or parol, raises an implied obligation on the tenant to keep the premises in repair. The cases do not lay down any precise rule as to the extent of this obligation, but it may be stated generally, that the tenant is bound to deliver up the premises in as good a condition as he found them, *reasonable wear and tear only excepted;* and this rule, it is clear, does not oblige him to make good any substantial part of the building, which has, by the natural progress of decay during his occupancy, become out of repair. Upon this subject, Lord *Kenyon* has stated the rule to be, that "a tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises: but his Lordship held, that the landlord was not entitled to recover a sum for putting a new roof on an old worn-out house. *Ferguson* v. ———, 2 Esp. N. P. C. 590; see also Countess of *Salop* v. *Crompton,* Cro. El. 777, 784.

Obligation of tenant to make repairs.

Rule as to tenants from year to year, where there is no express agreement.

And in a later case, where the landlord brought an actinn of *assumpsit* against his tenant from year to year for dilapidations; and in his declaration stated, that the defendant, in consideration of his having become tenant of a certain messuage, undertook (relying upon an implied and not an express contract,) to keep the same in good and tenantable repair, and to uphold and support, and to deliver up the same to the plaintiff at the expiration of his term, in the condition in which he received it; and then proved that the house was in good repair when the tenant entered it; but that, upon quitting it, he had in some degree damaged the ceiling, the walls, and other parts of the house, by removing the shelves and fixtures, and had not left the house in a good tenantable condition, so that the plaintiff had been put to a small expense in refitting it for the occupation of a new tenant; *Gibbs,* C. J., nonsuited the plaintiff; saying, that though the tenant might be answerable to some extent, he was not liable to the extent stated in the declaration; "can it be contended," said the learned Judge, "that a tenant at will is answerable if premises are burnt down (*a*); would *he be bound to rebuild if they became ruinous [*378] by any other accident, and yet, if bound to repair generally, he might be called on to this extent. He is bound to use the premises in a husband-like manner: *the law implies this duty and no more. I am sure it has always been holden,* that *a tenant from year to year is not liable for general repairs.*" *Horsefall* v. *Mather,* Holt's N. P. C. 7.

(*a*) See Countess of *Salop* v. *Crompton,* Cro. El. 777, 784; and as to the question of liability in the case of destruction by fire, *vide post.*

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As to covenants to repair.

But in leases by deed, the limits of the lessee's obligation in regard to the preservation and repair of the demised premises, are almost invariably defined by express covenants. On the construction of such covenants, many points have arisen. It has been held that a general covenant to repair extends to all buildings erected by the lessee during the term, as well as to the buildings demised; and, therefore, where a lessee in a lease of three messuages covenanted to pull down the houses, and rebuild three other houses, and that he would repair the houses so agreed to be built; *and also that he would repair the demised premises*, and leave the said premises in repair; and he pulled down the three and built *four* in their place, it was held that *though he was obliged to build only three houses*, yet he was bound to deliver up all in repair, the last covenant being general, and not confined, as the former, to the houses agreed to be built. *Dowse* v. *Cale*, 2 Ventr. 126; *S. C.* nom. *Douse* v. *Earle*, 3 Lev. 264. See also *Brown* v. *Blundell*, Skinn. 121. But in *Lant* v. *Norris*, 1 Burr. 287, where the lessee, in a lease of certain ground and buildings, covenanted to lay out the sum of 200*l.* within fifteen years, in erecting and *re*-building of messuages or tenements upon the demised ground and premises, and, from time to time, and at all times, all and singular the said messuages or tenements so *to be* erected, with all such other houses, &c. as should be thereafter erected, to repair; *and the said demised premises, with all such other houses so well repaired at the end of the term to deliver up, &c.;* the Court thought that this was merely a building lease; that the intention of the parties was, that the old premises should be pulled down, and consequently that the covenant extended only to the buildings newly erected, and was not broken by the pulling down of the old. The words, "the said demised premises," in the latter part of the covenant, which created the difficulty, were considered to have been introduced by mistake.

Covenant to repair, extends to buildings erected by the tenant.

Where such covenant extends to buildings for the purposes of trade.

A covenant to repair, and yield up repaired, all buildings that may be erected during the term, will extend to buildings erected for the purposes of trade, (though favoured, as we shall see, by the general rule in regard to fixtures), if let into the soil; *Thresher* v. *East London Water-Works Company*, 2 Barn. & Cress. 608; *S. C.* 4 D. & R. 62; but not such as merely rest upon blocks or pattens. *Naylor* v. *Collinge*, 1 Taunt. 19. A verandah fixed in the ground has also been held to be within the terms of such a covenant. Administrator of *Penry* v. *Brown*, 2 Stark. 403.

What amounts to a breach of covenant to repair.

The breaking a door-way through the wall of a demised house into an adjoining house, is a breach of the general covenant to repair. *Doe* d. *Vickery* v. *Jackson*, 2 Stark. 293. So it has been determined of breaking up pavement, carrying away locks and keys, breaking the glass of the windows, carrying away a shelf, *Pyot* v. Lady *St. John*, Cro. Jac. 329, and permitting the racks in a stable to go to decay. *Anon.* 2 Vent. 214.

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If a man covenant to repair a house, and it become ruinous by accident, the covenant will not be broken till after a convenient time for its reparation has elapsed. *Griffith's case*, Moor. 69, pl. 187; Shepp. Touchst. 173. But a covenant to repair and keep in repair, in the usual terms, is broken by the lessee permitting the buildings to be out of repair at any time during the term, and an action may be maintained against him before its expiration. *Luxmore* v. *Robson*, 1 Barn. & Ald. 584, which over-rules some early authorities. *Main's case*, 5 Rep. 21. (And see S. P. erroneously laid down, Woodf. *Land. & Ten.* 6th Edit. 255). But if the covenant be to *leave* the buildings in as good a state as he found them, he will be guilty of no breach of covenant during the term, though he pull them down, for he may rebuild them; therefore, no action will lie till the end of the term. Shepp. Touchst. 173. But it would, it seems, be otherwise as to cutting trees; "because, for them it is impossible that the covenant should be performed." Fitz. Nat. Brev. 145 k; Com. Dig. tit. "*Covenant*," (A 2), cit. *Main's case*, 5 Rep. 21 a.

Reasonable time allowed.

Covenant broken by non-repair *during the term*;

unless it be simply to *leave*, &c.

Where the lessee entered into a bond, conditioned to maintain, sustain, and repair two messuages, and, to an action for breach of the condition, he pleaded that he had repaired all the messuages except one bakehouse, which was so ruinous that he could not repair it, but pulled it down, and rebuilt another of the same dimensions, in as short a time as possible, and that this he had at all times well repaired: the Court, upon demurrer to this plea, decided that the plea was bad; for, he had bound himself to repair and maintain the old bakehouse, and though the condition was impossible, the obligation was good. *Wood* v. *Avery*, Saville, 96. But this decision seems to be at variance with the more liberal interpretation which has been given to covenants of this nature in later times, when the Courts have more readily yielded to considerations founded on the reason and nature of the case.

Construction according to the *letter*, in opposition to the *spirit*.

Thus, where, in a lease of four messuages for ninety-nine years, the lessee covenanted within two years to put them in good repair, and keep them in repair during the term; and further, within the first fifty years of the term, to take down the messuages *as occasion might require*, and in the place thereof to erect four new brick messuages; the Court of Common Pleas expressed an opinion, that if, within the fifty years, the houses should be so repaired, as to make them completely and substantially as good as new houses, the "occasion" on which the new houses were to be built did not arise. *Evelyn* v. *Raddish*, 7 Taunt. 411. The two preceding cases differ considerably in circumstances, but the principle seems to be the same.

Contra.

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*Where there is a general covenant to repair, with a particular covenant to repair upon notice, it should be made clearly apparent, (if such be the intention), that these covenants are intended to be distinct and independent; for, from a want of clearness in this respect, it has frequently been

Effect of general covenants to repair, and particular covenants to repair upon notice.

COVENANT TO REPAIR.

a question, whether the requisition of notice applies exclusively to the covenant with which it is connected by juxtaposition, or qualifies the whole.

In *Horsfall* v. *Testar*, 1 J. B. Moore, 89, the lessee covenanted to repair the premises at all times, as occasion should require, and *at farthest within three months after notice of any decay or want of reparation*, and it was held that this was one entire covenant, and not separate independent covenants, the former part being qualified by the latter; and the plaintiff (the lessor) was nonsuited for not setting out that part of the covenant. (For cases in which the same kind of question arose on the construction of a covenant for the payment of rent, see *Sicklemore* v. *Thistleton*, 6 M. & S. 9; and, on a proviso for re-entry on non-payment of rent, *Doe* d. *Rudd* v. *Golding*, 6 J. B. Moore, 231).

But where the lessee of a house covenanted that he would from time to time during the term, after three months' notice, sufficiently repair, *and* at the end of the term leave it sufficiently repaired, it was held that he was bound to leave the premises repaired, without notice, the latter part of the covenant being distinct. *Harflet* v. *Butcher*, Cro. Jac. 644.

So, in a late case, where the lessee covenanted to repair the premises when occasion should require, and the same so repaired to deliver up to the lessors; *And also*, that it should be lawful for the lessor to enter into and view the condition of the premises, and give notice in writing of any want of reparations to the lessee within six months;—it was held that these were separate covenants, and that it was not necessary to set out the latter covenant in the declaration. *Wood* v. *Day*, 1 J. B. Moore, 389. See also *Roe* d. *Goatly* v. *Paine*, 2 Campb. 520; *Doe* d. *Morecraft* v. *Meux*, 4 Barn. & Cress. 606; *S. C.* 7 D. & R. 98; *post*, p. 381.

Whether giving notice to repair waives a forfeiture previously incurred, in certain cases.

Another question which has arisen is, whether, assuming the covenants in question to be distinct, the lessor has precluded himself from taking advantage of the forfeiture consequent on the breach of the one covenant, by giving notice to the lessee to repair in pursuance of the requisition in the other (*a*). The distinctions which have obtained on this point deserve attention.

In *Roe* d. *Goatly* v. *Paine*, 2 Camp. 520, a lease contained a general covenant to keep the premises in repair, with a clause of re-entry for a breach of covenant, and a further covenant that the tenant should, within three months after notice from the landlord, repair all defects therein spe-

[*381] *cified, and the lessor gave notice to repair, but, before the expiration of the notice, brought an ejectment; and it was held that the lease was forfeited by breach of the first covenant, and that the notice was no waiver

(*a*) That a forfeiture incurred by a breach of covenant is waived by a subsequent notice *to quit*, see *Doe* d. *Scott* v. *Miller*, 1 Carr. & Payne, 348.

of the forfeiture. But in *Doe* d. *Morecraft* v. *Meux*, 4 Barn. & Cress. 606; *S. C.* 7 Dowl. & Ryl. 98, where a lease contained a covenant by the lessee to keep the premises in repair, and also to repair three months after notice, and there was a clause of re-entry for breach of any of the covenants, and the premises being out of repair, the lessor gave notice to the lessee to repair *within three months:* it was held, that this was a waiver of the forfeiture incurred by breach of the former general covenant to repair, and that the lessor could not bring ejectment until after the expiration of the three months, though he might have brought an *action* upon the former covenant notwithstanding the notice. In this case the Court distinguished the case of *Roe* d. *Goatly* v. *Paine*, *ante*, p. 380, on account of the notice in that case being to repair *forthwith*.

COVENANT TO REPAIR.

It was decided, in an early case, that a covenant by the lessee, that he would, after the repair of the messuages by the lessor, repair them during the term and leave them repaired, imposed no obligation on him to make repairs of a dove-house, part of the premises, until it had been once repaired by the lessor, *though it was in good repair at the beginning of the term*. *Slater* v. *Stone*, Cro. Jac. 645, *sed quære*.

It remains only to be noticed, that equity will not decree the specific performance of a general covenant to repair. See *Mosely* v. *Virgin*, 3 Ves. 185; *Hill* v. *Barclay*, 16 Ves. 405, though it is otherwise as to a covenant to build. *City of London* v. *Nash*, 3 Atk. 515.

Specific performance cannot be enforced.

COVENANT TO PAY TAXES.

COVENANT TO PAY TAXES.

According to the doctrine of several early cases, a covenant to pay taxes in general, extends to such taxes only as were in being, or at least are of the same nature as those in being when the lease was granted, and not to future taxes; *Davenant* v. Bishop of *Salisbury*, 2 Lev. 68; *S. C.* 1 Vent. 223; and therefore it was held, that if a new and extraordinary tax, not known before, was imposed by Parliament, a covenant, though referring to future taxes, did not extend to it; but, otherwise, if the tax was of the same nature as any of those in existence when the covenant was entered into. *Brewster* v. *Kitchin*, 1 Ld. Raym. 315; *S. C. nom. Brewster* v. *Kidgell*, 12 Mod. 167. See 11 Mod. 239. See also Count *Arran* v. *Crisp*, 12 Mod. 55.

Whether covenant to pay taxes extends to future taxes.

But in *Giles* v. *Hooper*, Carth. 135, a reservation of rent "free from all and all manner of taxes, charges, and impositions," was held to extend to "any old or new charge or imposition whatsoever;" and therefore to a parliamentary land-tax subsequently imposed: and such, it is probable, would now be the construction of an agreement of this nature; but in the form in which reservations of rent free from taxes, and covenants to pay taxes, are *ordinarily framed, *i. e.* as expressly extending to all future taxes, the question cannot arise. In agreements for leases, informally prepared, an indefinite stipulation of this nature is sometimes found; but

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COVENANT TO PAY TAXES.

there can be no doubt that a Court of Equity, in executing such an agreement, would direct a covenant to be inserted in the lease, embracing in the usual manner future taxes. In a late case, it was held by the Court of King's Bench, (diss. *Abbott*, C. J.), that where the lessor covenanted to pay all taxes then chargeable upon the premises, or the rent, or any part thereof, and the lessee to pay all *fresh* taxes, the latter covenant extended not only to taxes newly imposed, but to such additions to the former taxes as were occasioned by the improved value of the premises. *Watson* v. *Atkins*, 3 Barn. & Ald. 647; see also *Graham* v. *Wade*, 16 East, 29.

Covenant to pay *fresh* taxes, how construed.

Whether land-tax included in tenant's agreement to pay taxes generally.

The principal question raised on covenants to pay taxes has been in regard to the *land-tax*. It has often been decided, and is now clear, that an agreement to pay taxes generally extends to this tax.

Thus, in *Hopwood* v. *Barefoot*, 11 Mod. 237, it was held that a covenant that the lessee should pay all sums of money, that then were or should be taxed or assessed for or in respect of the premises demised, for chimney money, church or poor, or visited houses, *or otherwise*, extended to the land-tax; and in the late case of *Anfield* v. *White*, 1 Ryan & Moody, 246, Mr. Justice *Bayley* was of opinion that a verbal agreement to pay all taxes extended to the land-tax, although not specially named. See also *Bradbury* v. *Wright*, Doug. 624. Where the land-tax is excepted out of the lessee's covenant to pay all taxes, or the lessor expressly covenants to pay the land-tax, and save the lessee harmless therefrom, he is only bound to pay the land-tax assessed in respect of the rent received by him, and not that which is payable on the improved value of the premises. *Yaw* v. *Leman*, 1 Wils. 21; *Hyde* v. *Hill*, 3 D. & E. 377; *Barnfather* v. *Lee*, Id. 379, n.; *Whitfield* v. *Brandwood*, 2 Stark. 143. And in a late case, where a lease of a piece of ground, in which the lessee was restrained from building without licence, contained a covenant on the part of the lessor to pay all taxes, "already charged, or *to be charged*, upon or in respect of the said demised piece or parcel of ground," it was held, that this covenant did not oblige the lessor to pay taxes for the improved value occasioned by the lessee's building on the ground, by virtue of a licence from the lessor. *Watson* v. *Home*, 7 Barn. & Cress. 285; *S. C.* 1 M. & R. 191.

Lessor not bound to pay land-tax on improved value.

WHO BOUND BY, AND WHO MAY TAKE ADVANTAGE OF, COVENANTS.

WHO BOUND BY, AND WHO MAY TAKE ADVANTAGE OF, COVENANTS.

At common law, it should be seen, the remedies on covenants were confined to the "parties and privies" (*a*) to the covenant, and did not ex-

(*a*) The stat. 32 Hen. 8, c. 34, recites that, by the common law, no stranger to any covenant, action, or condition, shall take any advantage or benefit of the same, but only such as be parties or privies thereunto.

tend to grantees, and consequently the grantees of reversions could not take advantage of covenants in the leases granted by those under whom they claimed; and this state of the law produced little inconvenience in early times, when the transfer of property was comparatively unfrequent; but when the dissolution of the monasteries threw a large proportion of the land of the kingdom into new hands, the necessity of extending the benefit of such covenants to the new owners of the reversion, and giving (as the justice of the case obviously required,) a corresponding remedy to the lessees, was strongly felt. This led to the passing of the stat. 32 Hen. 8, c. 34, by which it is enacted, that as well all and every person and persons, and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant of our said sovereign lord, by his letters patents, of any lordships, &c. or other hereditaments, or of any reversion or reversions of the same, which did belong or appertain to any of the monasteries, &c., dissolved, as also all *other* persons, being grantees or assignees to or by our said sovereign lord the king, *or to or by any other person or persons than the king's highness*, and the heirs, executors, successors, and assigns of every of them, shall and may have and enjoy like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste, or

WHO BOUND BY, AND WHO MAY TAKE ADVANTAGE OF, COVENANTS.

Stat. 32 Hen. 8, c. 34.

Grantees of reversions to have the benefit of covenants, &c. in leases.

But if this be a correct statement of the antecedent rule of law upon the subject, how is it, that actions are at this day maintained on covenants for title, and other covenants affecting the land, by the grantee of the covenantee, though such covenants (in conveyances in fee), have been decided not to come within the statute, or by the assignees of lessees against the lessor, which the statute also leaves untouched? In the early cases too arising on the construction of the statute, it was often made a question whether, supposing the covenant to be out of the statute, the action might not be sustained by the *terre tenant* of the land for the time being, at common law, which could not have been the subject of discussion, if there had been an invariable and universal rule, confining the benefit of covenants to the parties themselves. It is to be inferred, therefore, that, by the expression "privies" in the statute, must have been intended persons claiming by privity of estate; but this does not altogether remove the difficulty suggested, for the statute itself, we shall see, has been confined to covenants running with the land. If, therefore, covenants of this nature entitled persons claiming by privity of estate to bring actions before the statute, and the statute received the same construction, how are the provisions of the statute remedial of any pre-existing evil? The point is not now of any practical importance. It is remarkable that the preamble takes no notice of the necessity of extending the obligation of the lessor's covenants to his grantees, to which object one branch of its provisions is directed.

WHO BOUND BY, AND WHO MAY TAKE ADVANTAGE OF COVENANTS.

other forfeiture: And also shall and may have and enjoy all and every such like and the same advantage, benefit, and remedies by action only for not performing of other conditions, covenants, or agreements contained and expressed in the indentures of their said leases, demises, or grants, against all any every the said lessees and farmers, and grantees, their executors, administrators, and assigns, as the said lessors or grantors themselves, or their heirs or successors, ought, should, or might have had, &c.

Lessee's remedy against grantees of reversions.

Sect. 2, enacts, that all farmers, lessees, and grantees of lordships, &c. or other hereditaments for terms of years, life or lives, their executors, administrators and assigns, shall and may have like action, advantage, and remedy, against all and every person and persons, and bodies politic, their heirs, successors and assigns, which have or shall have any gift or grant of the king our sovereign lord, *or of any other person or persons*, of the reversion of the same manors, &c. so letten, or any parcel thereof, for any condition, covenant, or agreement contained or expressed in the indentures of their lease and leases, as the same lessees, or any of them, might and should have had against the said lessors and grantors, their heirs and successors, &c.

Observations upon the statute.

Though the immediate object of this statute related to the lands of the dissolved monasteries which fell to the Crown, yet, it will be perceived, its provisions extend to vest in *all* grantees of reversions the benefit of covenants entered into with their grantors, and on the other hand give to the lessees a co-extensive remedy against the grantees of the reversion.

The following points have been decided upon the statute:—

Statute extends to copyholds.

1. That it extends to copyholds. *Glover* v. *Cope*, 3 Lev. 326; Salk. 185; 1 Show. 284; 4 Mod. 80; and see *Platt* v. *Plommer*, Cro. Car. 24; but see *Beal* v. *Brasier*, Cro. Jac. 305; *Swinnerton* v. *Miller*, Hob. 177.

—not to covenants in conveyances in fee-simple or fee-tail.

2. That it applies to covenants entered into by and with lessees for life and years, but not to covenants made between grantors and grantees in fee-simple or fee-tail. *Lewes* v. *Ridge*, Cro. El. 863.

—extends to assignees of reversionary terms.

3. That it extends to the assignees of reversionary terms of years, or, in other words, to the grantees of persons who have made under-leases. *Matures* v. *Westwood*, Cro. El. 617; *S. C.* nom. *Mathuris* v. *Westroray*, Moor. 527, pl. 695; *Davy* v. *Matthews*, Cro. El. 650.

—Grantees of partial interests.

4. That the persons claiming the benefit of the statute need not be grantees of the *whole* estate in reversion; but an action may be sustained by the grantee of a partial interest only; and, therefore, where the lessor (being tenant in fee), grants the reversion for years, or for life, such grantee may maintain an action against the lessee and his assigns. *Attoe* v. *Hemmings*, 2 Bulstr. 281; *S. C.* 2 Rol. Rep. 80. But in such cases the damages recovered can only be commensurate with the interest of the plaintiff, *Evelyn* v. *Raddish*, 1 Holt's N. P. Rep. 543, 545, n.; and the covenantor would be immediately liable to another action by the persons entitled to the ulterior interest, see *Biddlesford* v. *Onslow*, 3 Lev. 209; for

the present value of the reversion is diminished by an injury done to the land; and, therefore, such injury may be the subject of an immediate action. *Jesser* v. *Gifford*, 4 Burr. 2141. See also, on this subject, *Some* v. *Barwish*, Cro. Jac. 231; *Attersol* v. *Stevens*, 1 Taunt. 183.

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5. That, under this statute, an action is maintainable *by* or *against* the assignees of *part* of the lands demised; *Palmer* v. *Edwards*, 1 Dougl. 187; *Congham* v. *King*, Cro. Jac. 329; and by or against the grantees of *part* of the lands in reversion. *Twynam* v. *Pickard*, 2 Barn. & Ald. 105.

—Grantees, &c. of *part* of the lands demised.

6. That persons entitled in reversion or remainder are grantees within the meaning of the statute: and, therefore, where A., who was tenant for life under a settlement, with power of leasing, granted a lease in pursuance of the power, and the lessee covenanted with *him*, *his heirs*, *and assigns*, to pay the rent; it was held, that, upon the death of A., the next remainder-man might sustain an action for non-payment of rent on this covenant; for, as the estate limited in pursuance of the power was to be considered as if inserted in the deed creating the power, and, therefore, as virtually made by the settlor himself, the benefit of such covenant devolved, with the land, upon all the persons who successively took estates in remainder under that settlement. *Isherwood* v. *Oldknow*, 3 Mau. & Selw. 382; and see *Whitfield* v. *How*, 1 Vent. 238; *S. C.* Sir T. Jones, 110. But persons claiming by a title paramount to the lessor cannot, of course, claim the benefit of covenants entered into with him; and therefore a lord, who enters upon the lessor for a forfeiture, is not an assignee within the meaning of the statute, (Co. Litt. 215. b.)

—Remaindermen, (leases being made by tenants for life, &c.)

—Not to persons claiming by a paramount title.

Lastly, That the statute extends to covenants only, which immediately affect the nature, value, or mode of occupation of the subject of the demise, or, in other words, which run with the land, and not to personal and collateral covenants. This brings us to the consideration of what are covenants that run with the land,—a point of no less importance than difficulty. It should be premised, however, that, in order to fall within the operation of the statute, the covenant must be made with the person having the legal estate; and, therefore, if *cestui que trust* and his trustee join in a lease, covenants made with the former will not run with the land, or pass to his assignee. *Webb* v. *Russell*, 3 D. & E. 393; and see *Stokes* v. *Russell*, Ib. 678.

—To covenants that run with the land only.

It may also be observed, that the assignee of the reversion can only sue for breaches of covenant, occurring after the assignment; *Lewes* v. *Ridge*, Cro. El. 863; though, if there are continuing breaches, the fact of the covenant having been broken before, will not affect his remedy; as where buildings, which were out of repair at the time of the assignment, are suffered to continue in that condition afterwards. *Mascall's case*, Moor. 242. The *conversion* of a house into a shop is a breach consummated and complete at once, but the *using* any part of it for a prohibited purpose

For what breaches action maintainable.

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is a continuing breach. *Doe* d. *Ambler* v. *Woodbride*, 9 Barn. & Cress. 576; 4 M. & R. 302. A grantee or assignee may bring an action for a breach made during the continuance of his estate, after he has parted with that estate; for the statute, it is said, transfers the privity of contract, and the contract remains, though the privity of estate is gone. *Midgley* v. *Lovelace*, Carth. 289; *S. C.* Holt, 74; and see Com. *Land. & Ten.* 240.

WHAT COVENANTS RUN WITH THE LAND.

AS TO WHAT COVENANTS RUN WITH THE LAND.

Propositions in *Spencer's* case.

The leading authority upon this subject is *Spencer's case*, 5 Rep. 16, where several propositions are laid down, according to which it seems there are three species of covenants: *First*, Covenants which run with the land, though the assigns be not named; and of this kind are covenants "which extend to a thing *in esse*, parcel of the demise," as a covenant to repair the demised premises.

Secondly, Covenants which will bind assignees if named, but not otherwise; and to this class belong those which concern a thing to be newly done upon the thing demised, as to build a wall or a messuage, &c.

Thirdly, Covenants which are simply collateral, and which, as they do not concern the subject of demise, will not bind assignees, whether named or not; as a covenant to build a house on land not parcel of the demise, to pay a sum of money, or the like.

These propositions, it must be confessed, do not present a very satisfactory test for ascertaining the precise nature of those covenants which run with the land, and of those which do not; and the distinction between the first and second classes in particular seems not to be very solid. They, however, form the source from which the rules that have been applied in subsequent cases have been derived; and it is only by an examination of those cases that more definite notions upon the subject can be obtained. A short statement of the result of them is all that can be attempted here.

Enumeration of covenants which have been held to run with the land.

It has been decided, that a covenant for quiet enjoyment, (*Noke* v. *Awder*, Cro. Eliz. 375, 436; *White* v. *Ewer*, Ib. 823; see also *Campbell* v. *Lewis*, 3 J. B. Moore, 35; 8 Taunt. 715; *S. C.* 3 Barn. & Ald. 392), for further assurance, (*Middlemore* v. *Goodale*, Cro. Car. 503); to pay rent, (*Porter* v. *Sweetnam*, Sty. 406; *Parker* v. *Webb*, Salk. 5; see also *Warley* v. *Purley*, Cro. Jac. 291; *Long* v. *Nethercote*, Cro. Car. 143; *Walker* v. *Reeves*, 2 Doug. 262, n.; *Williams* v. *Bosanquet*, 4 J. B. Moore, 497); and make deductions out of it, (*Baylye* v. *Offord*, Cro. Car. 137); to build, (*Sampson* v. *Easterby*, 9 Barn. & Cress. 505); to repair, (*Anon.* Moore, 159, pl. 300; Dean and Chapter of *Windsor's case*, 5 Rep. 24; *S. C.* nom. *Hyde* v. Dean of *Windsor*, Cro. El. 552; *Porter* v. *Sweetnam*, Sty. 406; *Conan* v. *Kemise*, Sir W. Jones, 245, pl. 3; *S. C.* *Congham* v. *King*, Cro. Car. 221; *Alden* v. *Blague*, Cro. Jac. 99; *Pyot* v. Lady *St. John*, Id. 329; *Major* v. *Talbot*, Cro. Car. 285; *Tilney* v. *Norris*,

1 Lord Raym. 553; *Buckley* v. *Pirk*, 1 Salk. 317); or leave repaired, (*Matures* v. *Westwood*, Cro. El. 599, 617); to renew the lease, (*Istead* v. *Stoneley*, 1 And. 82; *Anon.* Moor. 159; *Finch* v. Earl of *Salisbury*, Finch, 212; *Richardson* v. *Sydenham*, 2 Vern. 447; *Furnival* v. *Crewe*, 3 Atk. 87. See also *Roe* d. *Bamford* v. *Hayley*, 12 East, 469); to cultivate the lands *in a particular manner, (*Cockson* v. *Cock*, Cro. Jac. 125); not to carry on [*387] particular trades, (*Tatem* v. *Chaplin*, 2 H. Bl. 133; and see 10 East, 130); to reside upon the premises, (Mayor of *Congleton* v. *Pattison*, 10 East, 136); to permit the lessor to have a free passage through certain parts of the demised premises, (*Bush* v. *Calis*, 1 Show. 389; *S. C.* nom. *Bush* v. *Coles*, Carth. 232), are covenants which run with the land.

So, a covenant to insure premises within the bills of mortality, mentioned in stat. 14 Geo. 3, c. 78, s. 83, has been held to be a covenant which runs with the land, because, by the provisions of that statute, the landlord may have the sum laid out in rebuilding the premises; *Vernon* v. *Smith*, 5 Barn. & Ald. 1; and, of course, a covenant in terms to insure for this purpose would have the same effect; but, it seems, that a covenant simply to insure, without such a provision for the application of the money, (the case not being within the building act), would be personal only.

So, in *Jourdain* v. *Wilson*, 4 Barn. & Ald. 266, a covenant by the lessor to supply the demised premises with sufficient water, was held to be a covenant that ran with the land, on the ground that it "respected the premises demised, and the manner of enjoyment;" and that, therefore, an action might be maintained by the assignee of the lease against the reversioner.

But, if the covenant only affect the land incidentally and indirectly, and have no immediate effect upon its nature, quality, or value, it will not run with it. Therefore, a covenant by the lessee to pay a sum annually to the churchwardens, will not bind the assignee, but is merely a collateral covenant. *Mayho* v. *Buckhurst*, Cro. Jac. 438.

So, where in a lease of ground, by the terms of which the lessee was to have liberty to erect a water-course and mill, the lessee covenanted for himself, his executors, administrators, *and assigns*, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate; this covenant was decided not to run with the land, and, therefore, not to be binding on the assignee of the lessee, though named; Lord *Ellenborough* observing, that it did not directly affect "the nature, quality, or value" of the thing demised, or the mode of occupying. Mayor of *Congleton* v. *Pattison*, 10 East, 136. A covenant by the lessor not to dispose of the demised premises without first offering them to the lessee, though made with him, his executors, administrators, *and assigns*, was lately considered not to run with the demised premises. *Collison* v. *Lettsom*, 6 Taunt. 224. The case, however, did not raise the point.

WHAT COVENANTS RUN WITH THE LAND.

In another case, where the lessee covenanted to leave all the trees he should plant during the term, and the lessor covenanted for himself, his executors, and administrators, to pay for the trees at a fair valuation by two persons, to be named by each party, their executors, administrators, and assigns. The term expired. The assignee of the lessor refused to name an arbitrator, upon which an action of covenant was brought by the lessee against the assignee. The Court of King's Bench held, on the authority of *Spencer's case*, that the covenant to refer to arbitration did not run with the land: and, therefore, the assignees were not bound by it, *not being named*. *Gray* v. *Cuthbertson*, 1 Selw. N. P. 485. The Court seems, [*388] *therefore, to have thought that this covenant belonged to the second class enumerated by Lord *Coke*.

It has also been determined that a covenant to pay, in a demise by way of mortgage, is a covenant in gross, and cannot be brought by an assignee. *Canham* v. *Rust*, 2 J. B. Moore, 164.

And though the act covenanted to be done may be beneficial to the reversion, it will not bind the assignee, though named, unless it be to be done upon the demised premises: as, if the lessee covenant to make a communication by water from the demised premises, through other persons' lands to another place, to facilitate the access to a market. *Per Bayley*, J., 10 East, 139.

As to covenants relating to incorporeal hereditaments.

The rules applicable to covenants that run with the land apply also to incorporeal hereditaments. Thus, where a lessee of tithes covenanted for himself, his executors, administrators, and assigns, not to let any of the farmers occupying the estate out of which the tithes arose have any part of the tithes, without the consent of the lessors; and further covenanted for himself and his assigns to find sufficient wheat straw for thatching the tithe barn and premises belonging to the lessor: the Court held that there was not any difference between lands and tithes as to the annexation of covenants; that this covenant was not a mere collateral covenant, but related to the thing demised, and, as such, fell within the rules laid down by Lord *Coke* in *Spencer's case*, and was binding on the assignee, *being named*, and there being a privity between the lessor and the assignee. *Bally* v. *Wells*, 3 Wils. 25; *S. C.* Wilmot's Cas. & Op. 341.

As to implied covenants.

Of course, covenants which result by implication of law, run with the land as well as where they are formally expressed. Thus, in the late case of *Vyvyan* v. *Arthur*, 1 Barn. & Cress. 410; *S. C.* 2 D. & R. 670, where A., seised in fee of lands, and also of a certain mill, demised the lands to B., his executors, administrators, and assigns, yielding and paying to the lessor, his heirs and assigns, certain rents, and doing certain suits and services, and *doing suit to the mill by grinding all such corn there as should grow upon the demised premises:* it was held, that the covenant which resulted by implication from this *reddendum* ran with the land, so long as

the lands and mill belonged to the same person; and therefore, that a person to whom A. devised both the lands and the mill, might sustain an action of covenant against the lessee and his representative, for not grinding the corn grown upon the premises at the mill.

WHAT COVENANTS RUN WITH THE LAND.

Such is the brief statement of the several cases upon this important subject. In framing covenants, which are intended to run with the land, the assigns should always be named; for, though some covenants, we have seen, will bind them though not named, and others will not bind them though they be named, yet as there is a middle class, in which assignees are bound, if named, and not otherwise, it is prudent to provide for the possibility of a covenant being held to belong to this class.

General remarks and suggestions.

EFFECT OF ASSIGNMENT, BANKRUPTCY, &c. IN REGARD TO LIABILITY UNDER COVENANTS.

Assignment does not discharge covenantor.

The statute of 32 Hen. 8, c. 34, in subjecting the grantees of reversions to the covenants entered into by the lessors, in regard to the demised premises, has not exonerated the covenanting parties themselves, and their representatives, from such covenants; (though the expression, that the statute has "transferred the very privity of contract," which has been sometimes used, (see Lord *Holt's* judgment in *Midgley* v. *Lovelace*, Carth. 289; also 1 Wms.'s Saund. 240), might seem to imply the contrary); for, as the covenantor is bound, in such case, by express contract, and not by privity of estate merely, the obligation, by virtue of the covenant, exists independently of the state of the ownership of the property. The principle of course applies to lessees. Thus, it has long been held, that a lessee, or his representatives, is not discharged from the covenant for payment of rent, or any other covenant, whether running with the land or not, by an assignment. *Rushden's case*, Dy. 4 b; *Matures* v. *Westwood*, Cro. El. 617; *Broom* v. *Hore*, Id. 633; *Ard* v. *Watkin*, Id. 637; *Bachelour* v. *Gage*, Cro. Car. 188. Nor does the fact of the lessor having recognised the assignee as his tenant, by the acceptance of rent, discharge the lessee; *Barnard* v. *Godscall*, Cro. Jac. 309; *Brett* v. *Cumberland*, Cro. Jac. 521; *Bachelour* v. *Gage*, Cro. Car. 188; *Glover* v. *Cope*, 3 Lev. 326, 1 Salk. 326, 1 Show. 185, 4 Mod. 80; *Orgill* v. *Kemshead*, 4 Taunt. 642; though, as he has by this act "extinguished the privity of contract," he cannot have an action of *debt* against the lessee. *Walker's case*, 3 Rep. 24; *Marsh* v. *Brace*, Cro. Jac. 334.

Assignee discharged by assignment.

On the other hand, an assignee, whose liability to the covenant arises by privity of estate, and is consequential on his ownership merely, ceases to be liable when such ownership ceases: he may, therefore, at any time discharge himself by assigning the land to another person, and it is no objection to the exonerating effect of such an assignment, that the assignor gave no notice of it to the lessor, or that the assignee is an indi-

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gent person, incapable of performing the covenants. *Pitcher* v. *Toovey*, 1 Show. 340; *Lekeux* v. *Nash*, Stra. 1221; *Taylor* v. *Shum*, 1 Bos. & Pul. 21.

COVENANTS. EFFECT OF BANKRUPTCY.

EFFECT OF BANKRUPTCY.

Effect of bankruptcy of lessee upon his covenants.

The effects of bankruptcy upon the obligatory force of the covenants in a lease are important to be considered. Formerly, a bankrupt lessee, (for it is in regard to *him* only that the question has generally arisen), was liable to the covenants in the lease after the bankruptcy, and his certificate did not discharge him; *Mills* v. *Auriol*, 1 Hen. Blackst. 433; but the modern bankrupt statutes have considerably qualified this liability.

Stat. 6 Geo. 4, c. 16, s. 75.

The late act, 6 Geo. 4, c. 16, s. 75, (which alone it is now necessary to inquire *into), enacts, That any bankrupt, entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; and, if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid. And if the assignees shall not (upon being thereto required) elect whether they will accept or decline such lease or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor, or person so agreeing, shall be entitled to apply, by petition, to the Lord Chancellor, who may order them so to elect, and to deliver up such lease or agreement, in case they shall decline the same, and the possession of the premises, or may make such other order therein as he shall think fit.

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Acceptance of lease by assignees to discharge bankrupt.

If they decline, he may deliver up lease.

Assignees compellable to elect.

Until the assignees have elected, the term remains in the bankrupt, and an action may be maintained against him in respect of such ownership. *Copeland* v. *Stephens*, 1 Barn. & Ald. 593. And it has been held that the delivery up of the lease does not operate retrospectively by relation; and, therefore, the bankrupt, and any other person who may have joined with him as surety in the covenants of the lease, are liable for the rent antecedently accrued. *Tuck* v. *Fyson*, 6 Bing. 321.

Remarks upon the statute.

The statute, it will be observed, merely exonerates a bankrupt lessee delivering up his lease from the rent and covenants, and does not in terms declare the lease to be void. It is probable, however, that the bankrupt's relinquishment of the lease would be held to have the effect of absolutely vacating it, as it could not have been intended that the bankrupt should cease to be liable to the rent and covenants, and yet that the term should remain in him. Even before the present act (*i. e.* under the stat. 49 Geo. 3) it was held that the Lord Chancellor had authority to determine the lease, if the assignees rejected it; *Ex parte Nixon*, 1 Rose,

445; *Ex parte Maundrell*, Buck, 83; and the provision introduced into the statute now in operation was probably designed to render the interference of the Court for this purpose unnecessary, by giving to the act of the bankrupt the same effect. COVENANTS. EFFECT OF BANKRUPTCY.

The statutory provision under consideration also, it is evident, only contemplates the case of a bankrupt solely entitled, and not that of his being one of several joint lessees; in which case, he clearly ought not to be at liberty to "deliver up" the lease to the prejudice of his co-lessee. In such case, it is presumed that his relinquishment of his interest would be held to operate to vest the entire property in his co-lessee. In all cases not expressly provided for by the act, the Lord Chancellor would probably be considered as having jurisdiction to declare the lease void under the authority given him to make "such *other* order therein as he shall think fit," according to the liberal construction which nearly similar words in the former statute received. *Ex parte Nixon*, 1 Rose, 445; *Ex parte Maundrell*, Buck, 83. The effect of such an order is to determine the lease for all purposes.

Stat. 7 Geo. 4, c. 57.

The late insolvent act, 7 Geo. 4, c. 57, s. 23, enacts, that in all cases in which any prisoner shall be entitled to any lease, or agreement for a lease, and his assignee or assignees shall accept the same, and the benefit thereof, as part of such prisoner's estate and effects, the said prisoner shall not be, or be deemed to be, liable to pay any subsequent rent to which his or her discharge, adjudicated according to this act, may not apply; nor be in any manner sued, after such acceptance, in respect or by reason of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; *provided*, that, in all such cases as aforesaid, it shall be lawful for the lessor or person agreeing to make such lease, his heirs, executors, administrators, or assigns, if the said assignee or assignees shall decline, upon his or their being required so to do, to determine whether he or they will or will not accept such lease or agreement for a lease, to apply to the said Court, praying that he or they may either so accept the same, or deliver up such lease or agreement for a lease, and the possession of the premises demised, or intended to be demised; and the said Court shall thereupon make such order as, in all the circumstances of the case, shall seem meet and just, and such order shall be binding on all parties.

Acceptance of lease by assignees of insolvent, to discharge him.

Assignee compelled to elect.

It therefore becomes material to inquire, what acts of the assignees of a bankrupt or insolvent amount, in construction of law, to an acceptance of the lease. It is clear, that the mere attempt to dispose of the property for the benefit of the estate, has no such effect. Thus, where the assignees of a bankrupt advertised for sale the lease of certain premises, of which the bankrupt *was lessee, without stating themselves in the advertisement to be the owners or possessors, and no bidding being offered, they did not take actual possession of the premises: the Court of King's Bench

What acts amount to an acceptance by assignees.

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Putting up pre-

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mises for sale, no adoption of the lease.

held, that the mere putting of them up to sale did not necessarily make them assignees; because it might be only an experiment, to ascertain what their value was, and whether they would be beneficial to the common cause. *Turner* v. *Richardson*, 7 East, 335. So, where the assignees of a bankrupt had allowed his effects to remain upon the premises occupied by him, for nearly a twelvemonth after the bankruptcy, and, for the purpose of preventing a distress, paid the arrears of rent due, at the same time intimating to the lessor that they did not intend to take the lease, unless it could be advantageously disposed of; and afterwards, having put up the lease to auction, and finding no bidders, never took actual possession of the premises, though they kept the key for nearly four months afterwards, the landlord not having demanded it; Lord *Ellenborough*, C. J., held, that under these circumstances they had not made themselves assignees of the lease, his Lordship observing, that it was admitted *that they had a right to make the experiment of a sale, without incurring any personal liability.* *Wheeler* v. *Bramah*, 3 Camp. 340; *S. C.* 1 Rose, 363.

Again, where the assignee of an insolvent debtor, under the stat. 1 Geo. 4, c. 119, took possession of the premises, having, it seems, accepted the lease conditionally, in order to see whether he could turn it to advantage, and did not wholly abandon the premises for five months after the assignment, and in the interval endeavoured to let them, but without success, it was held, (the point being left to the jury whether the assignee had given up the premises in reasonable time), that he was not bound by these acts to adopt the lease. *Lindsay* v. *Limbert*, 1 Carr. & Payne, 526.

In a late case, it was held, that the act of joining the bankrupt in releasing an under-tenant, did not amount to an acceptance of the original lease by the assignees. *Hill* v. *Dobie*, 2 J. B. Moore, 342; *S. C.* 8 Taunt. 325.

Acts which have been held to be an adoption of the lease.

On the other hand, where the lessee of pasture land became bankrupt, and his assignees suffered his cows to remain on the land for two days after their appointment to the office, and ordered them to be milked there, Lord *Ellenborough* was of opinion, that this was an adoption of the lease by the assignees, so as to make them tenants to the lessor. *Welch* v. *Myers*, 4 Camp. 368. So, where a bankrupt had a lease of premises, and also a reversionary interest in them, and the assignees sold all his estate and reversionary interest in the premises, the same noble and learned Judge held, that the assignees must be considered as having accepted the lease. *Page* v. *Godden*, 2 Stark. 309.

Taking possession unconditionally.

In another case, an intermeddling with a farm of the bankrupt's, supported by some oral declarations, tending to shew that the assignees considered themselves as tenants, was decided to fix them with the lease. *Thomas* v. *Pemberton*, 7 Taunt. 206. And where the assignees took actual possession of leasehold premises, in which were goods of the bank-

rupt, but delivered them up as soon as the goods were sold, the Court of King's Bench held, that the fact of their taking possession *unconditionally* distinguished the case from *Turner* v. *Richardson*, and *Wheeler* v. *Bramah*, and thereby the assignees had made themselves liable to the covenants in the lease. Lord *Ellenborough* observed, (and the observation affords a useful guide to the conduct of assignees on such occasions), that if the assignees had intended to curtail this act of its legal effect, *they should have entered, with a protest that their entry was not for the purpose of possessing themselves of the premises as assignees.* *Hanson* v. *Stevenson*, 1 Barn. & Ald. 303. See also 1 Ryan & Mood. 217.

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Caution to assignees taking possession.

AS TO THE LIABILITY OF EXECUTORS OR ADMINISTRATORS OF LESSEES.

LIABILTY OF EXECUTORS OR ADMINISTRATORS.

In regard to the liability of the executors or administrators of lessees to the payment of the rent and performance of the covenants entered into by their testator or intestate, much learning is to be found in the early writers. The following positions embody the result of the numerous authorities:—

Positions shewing the result of the authorities.

First, That executors or administrators are liable to the payment of the rent out of the general assets, and the performance of the covenants of a lease granted to their testator or intestate. *Agard* v. *King*, Cro. El. 775; *Howse* v. *Webster*, Yelv. 103; *Bachelour* v. *Gage*, Cro. Car. 188; *Simmons* v. *Bolland*, 3 Mer. 547; *Vyvyan* v. *Arthur*, 1 Barn. & Cress. 410; *S. C.* 2 Dow. & Ryl. 470. And it has been lately decided, that they are entitled to be indemnified in respect of this liability, previously to their giving up the property to the persons beneficially entitled. *Simmons* v. *Bolland*, 3 Mer. 547, stated *ante*, Vol. 3, p. 383, 2nd edit.

Secondly, That their liability in the representative character is not dependent upon, or at all affected by, the fact of their having entered upon the property or not; for, as an executor or administrator cannot "assume the office for part, and refuse for part," his responsibility remains the same, notwithstanding his non-assumption of the possession. *Bolton* v. *Cannon*, 1 Vent. 271; *S. C.* 1 Freem. 336, 393; *S. C. nom. Bolton* v. *Canham*, Pollex. 59; *Howse* v. *Webster*, Yelv. 103.

Thirdly, That if an executor or administrator enter upon the lands, he is chargeable in respect of his perception of the profis "*as assignee;*" *i. e.* he is personally liable to the lessor for the rent, *the surplus only of the profits, after payment of such rent, being assets in his hands.* Corporation of *Ipswich* v. *Martin*, Cro. Jac. 411; *Sackvill* v. *Evans*, 1 Freem. 171; *Bolton* v. *Cannon*, Ib. 393; *S. C. nom. Bolton* v. *Canham*, Pollex. 59; *Helier* v. *Casebert*, 1 Lev. 127, 128; *Billinghurst* v. *Speerman*, 1 Salk. 297; *Tilney* v. *Norris*, Id. 309; and *vide* Id. 317. So that "if an executor hath a lease for years of lands of the value of 20*l.* *per annum*, rendering 10*l.* *per annum* rent, it is assets in his hands *only for* 10*l.* *over and above the rent.*" *Body* v. *Hargraves*, Cro. El. 711; see also *Hargrave's case*, 5 Rep. 31. See Dy. 82 b. According to the doctrine of one decision, in-

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deed, the executor is liable, notwithstanding his non-entry in such a case. *Mawle* v. *Cacyffyr*, Cro. Jac. 549.

Fourthly, But, at all events, even after entry, the executor or administrator may discharge himself by pleading that the land is of less value than the rent; and this may, it seems, where not specially pleaded, be shewn in evidence. *Billinghurst* v. *Speerman*, 1 Salk. 297; 1 Saund. 1, (Serjt. Wms.'s n.); *Remnant* v. *Bremridge*, 2 J. B. Moore, 94; *S. C.* 8 Taunt. 191.

It is evident, therefore, that the lessor has an option to charge the executor, in his representative character, *i. e.* in the *detinet* only, or as assignee, *i. e.* in both the *debet* and *detinet*. In the former case, he may plead *plene administravit*, and the judgment, if recovered, will be *de bonis testatoris; Buckley* v. *Pirk*, Salk. 316; *Lyddal* v. *Dunlap*, 1 Wils. 4; in the latter, this plea, of course, will not avail him; and the judgment, if recovered, (which will depend upon the fact of having rendered himself liable by the perception of profits), will be *de bonis propriis*.

Whether executor or administrator chargeable as assignee in certain cases.

The doctrine, which affirms that an executor or administrator is liable as assignee, where the profits exceed the rent, does not go on to prescribe what is the destination of the profits, in cases in which the occupation, though not altogether unproductive, yields less than the rent. Upon principle, it should seem that, as the executor is liable to the whole rent, where he derives a profit adequate to such rent, he would, by parity of reasoning, be chargeable *pro tanto*, where the profit is deficient; but the authorities do not distinctly warrant this position, and, indeed, the terms in which the rule is laid down, seem impliedly to contradict it. If he is not chargeable as assignee, in the case suggested, such profit must, it is conceived, be assets in his hands; but here again, the doctrine, repeatedly maintained, that the surplus profits only are assets, may seem to negative the conclusion; and which seems to be farther opposed by the approval, that has been expressed, of the conduct of executors or administrators in having offered to surrender an onerous lease to the lessor; which can only be founded on the supposition that the estate can in no event be benefited by such a lease. In the various cases in which the points upon the general doctrine of the liability of the personal representatives of lessees have arisen, no very comprehensive view of the subject seems to have been taken, and the principle upon which they are chargeable as assignees is by no means satisfactorily explained; the cases are, we have seen, not uniform in making entry a necessary circumstance in the case; and it is remarkable that the case of *Mawle* v. *Cacyffyr*, Cro. Jac. 549, where the necessity of entry is denied for such purpose, has not been noticed by Mr. Serjeant Williams in his note, (see Saund. 1), which is often referred to on this subject, nor in any of the subsequent cases. The general doctrine underwent some discussion in the late case of *Remnant* v. *Bremridge*, 2 J. B. Moore, 94; *S. C.* 8 Taunt. 191; where an unproductive oc-

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cupation was held not to entail any responsibility on an administrator. The circumstances were these: The administrator of a deceased lessee sold bricks off the demised premises, and caused a board to be stuck up and continued on the premises for many months, denoting that the ground was to be let or sold, and referring parties for information to his agent; and, eight months after the death of the intestate, offered to relinquish the premises to the lessor, but the offer was not accepted. It appeared that the estate was insolvent, *and that he had received no profits from the land;* the present action was brought against the administrator as assignee, and the Court of Common Pleas was of opinion, that the plaintiff was not entitled to recover, adverting particularly to the circumstances of the defendant having derived no benefit from the premises, and having offered to give them up.

Remarks upon *Remnant* v. *Bremridge* and suggestion arising from the cases.

The judgment of the learned Chief Justice (*Dallas*) in this case does not seem to have relieved the subject from the difficulties which have been suggested: he certainly treats possession as necessary to charge the administrator as assignee; but he does not appear to have kept distinctly in view the difference between charging him as administrator, and charging him as assignee; for one of the grounds upon which he rests the administrator's non-liability in the case before the Court is, the insolvency of the estate; whereas this fact, in an action charging him in the *debet* and *detinet*, is totally immaterial, since the plea of *plene administravit* would clearly be no answer to such an action. The case, however, and the general tenor of the authorities, suggest the observation, that wherever a lease, which is not beneficial, forms part of the estate of a lessee, who has died insolvent, the executor or administrator is at liberty, and, it should seem, ought, to offer to surrender to the lessor, and that he will not, after such offer, be liable in respect of his occupation, if he has derived no advantage from it. The executor or administrator, in such a case, should, of course, be prepared to shew, for the satisfaction of creditors and other persons interested, that the retention of the lease so surrendered would have been an incumbrance, and not a benefit to the estate.

WHERE COVENANTS ARE DEPENDENT, AND WHERE NOT. WHAT PAYMENTS MAY BE SET OFF AGAINST THE CLAIM OF RENT.

COVENANTS, WHETHER DEPENDENT OR NOT.

Covenants cannot be set off against each other.

It is to be observed, that mutual covenants cannot be set off against each other, but the parties must bring cross actions in order to avail themselves of the benefit of their respective covenants.

Thus, it is no answer to an action for the recovery of rent, to shew that the lessor has not performed his covenant to repair, by which the defendant has incurred expenses more than equal to the sum demanded; *Leeds* v. *Cheetham*, 1 Sim. 146; *Saunders* v. *Musgrave*, 6 Barn. & Cress. 524; *S. C.* 2 C. & P. 294; but see *Edwards* v. *Etherington*, 1 Ryan & Moody, 268,

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post, p. 396; nor *vice versâ;* and the principle applies wherever the claim under either covenant is for unliquidated damages. *Howlett* v. *Strickland*, Cowp. 56; *Weigall* v. *Waters*, 6 D. & E. 488. It has been laid down, indeed, by a respectable writer, upon the authority of the case of *Beale* v. *Taylor*, *1 Leon. 237; *S. C.* Cro. El. 222, "that if the lessor covenant to repair, and does not do it, the lessee may do it, and pay himself by way of retainer out of the rent." Chamb. *Land. & Ten.* 408. But this case and doctrine have been clearly over-ruled by the modern cases before cited.

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What words qualify covenants.

In many instances, however, covenants have been held to be independent, where the terms of them might seem to afford ground for inferring that the parties intended the one to be a qualification and condition of the other: as, where a person covenants that he will do a certain act, *the covenantee performing some other act.*

Covenant for quiet enjoyment.

Such has been the construction given to the lessor's covenant for quiet enjoyment, in the terms in which that covenant is frequently expressed, namely, that the lessee, *paying and performing the rents and covenants*, shall quietly enjoy; for it has been held, that the lessor cannot plead non-payment of the rent in bar to an action on this covenant. *North*, C. J., said, though, at first putting these words into leases, they might have a conditional signification, yet now they were so usual that they were almost matter of form. *Hayes* v. *Bickerstaff*, 1 Freem. 194; *S. C.* 2 Mod. 34, which over-rules *Anon.* 4 Leon. 50.

So, where in a lease to A. were excepted the trees, with liberty to the lessor to cut and carry them away, *he mending the fences and filling up the pits;* in an action of trespass by the lessee against the lessor's grantee of the trees, in which the defendant justified under this liberty, &c., it was objected, that he had not alleged that he had mended the fences and filled up the pits; but the Court decided that it was not a condition, but a covenant, for which the lessee might bring an action. *Warren* v. *Asters*, T. Jones, 206; *S. C.* Willes, 497, n.

Again, where A. conveyed certain plantations and negroes to B., in consideration of 500*l.* and a certain annuity, and covenanted for the title; and B. covenanted that *A. well and truly performing every thing contained on his part to be performed*, he would pay the annuity; B. pleaded to an action on this covenant, that A. was not legally possessed, and had not a good title, and the plea was held to be bad. *Boone* v. *Eyre*, 1 Hen. Blackst. 273.

Covenant conditional where covenantee is to supply the means of performance.

But, where the means of enabling the covenantor to perform the covenant are to be provided by the covenantee himself, this will be considered as a qualification of the covenant, and the neglect to perform the act will excuse the non-performance of the covenant.

Thus, where the lessee covenanted with a lessor to repair, "*he, the said lessor, finding, allowing, and assigning timber sufficient for such reparations*, during the said term, to be cut and carried by the lessee, his executors,

&c." To an action on the covenant, the lessee pleaded that the lessor did not allow timber; and this plea was held to be good on demurrer, on the ground that the clause in question was not a covenant to provide timber, *but a qualification of the covenant to repair. *Thomas* v. *Cadwallader*, Willes, 496; see also *Porter* v. *Shephard*, 6 D. & E. 665, *post*.

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And where the *whole* consideration for which the covenant is entered into fails, the covenantee cannot in general maintain an action on the covenant. *Jones* v. *Barkley*, Dougl. 684; *Goodison* v. *Nunn*, 4 D. & E. 761; *Glazebrook* v. *Woodrow*, 8 D. & E. 366 (*a*).

Rule where the entire consideration for the covenant fails.

Upon this principle, too, it is clear that no action can be maintained on a lessee's covenant to pay rent accruing after eviction, whether such eviction have taken place by the act of the lessor, or under a paramount title; the only difference being, that, in the latter case, the rent ceases *pro tanto* only, but, in the former, an eviction from part suspends the rent of the whole. See case cit. Com. *Land. & Ten.* 457. So, it has been determined that eviction is a sufficient bar to an action against the lessee on a covenant to repair. *Andrews* v. *Needham*, Cro. El. 656. And in a late case, where the demised premises had become dangerous and wholly unfit for occupation for want of repair, and the tenant (who was under no obligation to repair,) in consequence quitted them without notice; Lord C. J. *Abbott* was of opinion, that the landlord was not entitled to recover in an action for use and occupation. *Edwards* v. *Etherington*, 1 Ryan & Moody, 268.

No set off against rent.

It should be observed too, that though, as before stated, the lessee cannot set off monies paid for repairs, &c., against the landlord's claim for rent, unless authorized so to do; yet, of course, an express provision may be introduced, authorizing such a deduction on that or any other account. *Johnson* v. *Carre*, 1 Lev. 152; *Baylye* v. *Offord*, Cro. Car. 137.

Ground-rent paid to a superior landlord, may be pleaded as part payment.

The lessee may also, *without* an express authority, plead certain payments as payment of the rent; as, for instance, ground-rent paid by him to the superior landlord, on a threat of distress, *Sapsford* v. *Fletcher*, 4 D. & E. 511; *Cobb* v. *Carpenter*, 2 Camp. 13, n., or monies paid to a person

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(*a*) See further, as to whether covenants are independent or conditional, *Pordage* v. *Cole*, 1 Saund. 319; *Northcote* v. *Underhill*, Ld. Raym. 388; *S. C.* Salk. 199; *Clayton* v. *Kynaston*, Ld. Raym. 420; *Campbell* v. *Jones*, 6 D. & E. 571; *Porter* v. *Shephard*, Id. 665; *Havelock* v. *Geddes*, 10 East, 555; *Gibbon* v. *Mendez*, 1 Barn. & Ald. 17; *Fothergill* v. *Walton*, 8 Taunt. 576. The question depends upon the intention of the parties, to be collected from the whole of the instrument; but this rule, though frequently laid down in reference to particular covenants, &c., is a universal rule of construction, applicable to every instrument, and to all its parts.

COVENANTS, WHETHER DEPENDENT OR NOT.

As to monies paid by tenant to the owner of a rent-charge.

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having a rent-charge issuing out of the land. *Taylor* v. *Zamira*, 2 Marsh. 220; *S. C.* 6 Taunt. 524. It was objected in this case, that, to allow the lessee to plead such payment to an avowry in an action of replevin, was to contravene the rule, that a tenant cannot impeach his landlord's title. *But Lord C. J. *Gibbs* answered this reasoning by observing, "that the plaintiff does not contend that the landlord cannot distrain, because another has a better and a previous title, but because the land which ought to have been given up to him unincumbered, was burthened with and subject to a rent-charge when the defendant let it to him, which original rent-charge the defendant has been obliged to pay; *the prior incumbrance would have been no answer, if it had not been exacted;* but the two facts, coupled together, do constitute a complete defence." See 2 Marsh. 225. In the late case of *Carter* v. *Carter*, 2 Moore & Payne, 732, it was held, that though the ground-rent was paid by the tenant, on the mere application of the ground-landlord, without any threat of distraining, and when no rent was due from the tenant to his landlord, the tenant was entitled to consider the sum so paid as part payment of rent subsequently due.

Land-tax.

So, under the land-tax acts, a tenant may tender land-tax receipts in or toward payment of the rent. *Andrew* v. *Hancock*, 1 Brod. & Bing. 37; *S. C.* 3 J. B. Moore, 278; *Spragg* v. *Hammond*, 4 J. B. Moore, 431; *S. C.* 2 Brod. & Bing. 59. See also stat. 38 Geo. 3, c. 5, *ante*, Vol. 3, p. 390, 2nd edit. And where one tenant, who has paid any tax, transfers the occupation to another, handing over to the succeeding tenant the receipt, the latter may, it seems, obtain the allowance. *Clennel* v. *Read*, 2 Marsh. 371. But it is material to observe, that the land-tax, so deducted, must have accrued within the same period as the rent out of which the deduction is proposed to be made; for it has been decided, that the lessee cannot set off, against the rent of a given year, the land-tax of a former year, which was omitted to be deducted out of the rent of that former year. *Stubbs* v. *Parsons*, 3 Barn. & Ald. 516; *Andrew* v. *Hancock*, 3 J. B. Moore, 278; *S. C.* 1 Brod. & Bing. 37. See also as to paving rates, Ib. In the case of *Carter* v. *Carter*, 2 Moore & Payne, 732, however, the land-tax paid by the tenant extended over a larger period than the rent out of which it was claimed to be deducted, and no objection seems to have been distinctly made on this ground; the excess, indeed, was trivial, being only one quarter.

Deduction must be made out of the rent of the current year.

Tenant's remedy for monies which he cannot claim to deduct out of rent.

Where the tenant cannot plead as payment of rent sums paid by him on the landlord's account, his only remedy against the landlord is by an action for the sums so paid; and even this remedy will be barred by a long acquiescence, as, by paying rent for a considerable period without claiming any deduction, especially if a claim antecedently made has been abandoned.

Thus, in *Spragg* v. *Hammond*, 4 J. B. Moore, 431; *S. C.* 2 Brod. & Bing. 59, where the tenant under a lease which contained no stipulation as to any taxes, claimed, in 1814, a deduction for land-tax and sewers-rates

COVENANTS, WHETHER DEPENDENT OR NOT.

paid by him, which claim was refused by the landlord, who distrained for and was paid the whole rent, and the tenant afterwards paid the full rent for five successive years, without claiming to deduct such taxes; it was held, that this long acquiescence amounted to a dereliction of his claim, and, therefore, he could not recover the sums so paid from the landlord, as involuntary payments. (See the cases cited in the arguments).

So, on the same principle, where the landlord made a larger deduction of land-tax than the tenant was entitled to, (having deducted for the im-*proved value, which we have seen the tenant is not entitled to, (*vide ante*, p. 382), for seventeen years, it was held that he could not distrain for the amount so improperly allowed as rent unpaid, he having the knowledge, or the means of knowing, the facts under which the deduction was made. *Bramston* v. *Robins*, 4 Bing. 11.

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Tenant cannot set off ground-rent paid by him, which became due before the lessor's title commenced.

The question as to the tenant's right to plead against the rent demanded of him payment of an arrear of ground-rent to the superior landlord, accruing *antecedently* to his landlord's title, was raised in the late case of *Cobb* v. *Carpenter*, 2 Campb. 13, n., where J. S. let certain leasehold premises to the defendant, then mortgaged them to W. S., and afterwards, in 1806, assigned the equity of redemption to the plaintiff. On the 18th of July, 1806, W. S. assigned the legal estate to the plaintiff, who brought an action against the defendant (the tenant) for use and occupation for two years, which included part of the period during which he had the equitable ownership only; Lord *Ellenborough* held, that he could not recover the rent, except for the period that he had the legal estate; and, (which is the point most material for the present purpose), that the defendant, who, just before he quitted, had been distrained upon by the ground-landlord for several years' ground-rent, amounting to a much larger sum than was due to the plaintiff, *could only set off a part of this sum, proportioned to the period during which the plaintiff had the legal estate.*

This case, it will be observed, does not decide that a lessee cannot, in any case, set off ground-rent, accruing within a different or longer period than the rent out of which it is claimed to be deducted, but merely that rent, accruing *before the landlord's title commenced*, cannot be so set off against him.

Distinction as to form of action by tenant to recover monies paid.

Here it may be noticed, that there is a difference as to the form of the action, where a lessee pays money to the superior landlord to redeem a distress for rent, and where the claim is satisfied out of the goods distrained. In the former case, the money may be recovered as money paid to the lessor's use; *Exall* v. *Partridge*, 8 D. & E. 308; but in the latter, inasmuch as the *produce* of the goods never was the property of the tenant, but went immediately into the pocket of the lessor, it cannot be recovered as money paid by him. *Moore* v. *Pyrke*, 11 East, 52.

INDORSEMENTS ON LEASES.

VIII. AS TO INDORSEMENTS ON LEASES.

Where it is intended to change or add to the provisions of a lease already prepared, this alteration is usually effected by way of indorsement, and the memorandum so indorsed, if made previously to the execution of the lease, is, in point of construction and effect, considered as part of the instrument.

Provisions in leases may be varied by indorsement.

Thus, in *Goodright* d. *Nicholls* v. *Mark*, 4 M. & S. 30, where lands were demised for twenty-one years, determinable by the lessees at the *end of seven or fourteen years, on giving twelve months' notice, a memorandum was indorsed before its execution, by which it was agreed that the lessor should have the same option of determining the lease, as the lessees, upon a like notice: and it was not attempted to be denied that this clause formed an integral part of the lease. See also Cro. Jac. 456.

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Caution suggested in framing indorsements.

Indorsements, however, for varying the provisions of a lease or other instrument, as originally prepared, should always be framed with great care, and with a due regard to the whole contents of the instrument; for, a memorandum of this nature, being generally the offspring of some sudden and unpremeditated arrangement between the parties, when the deed is ready for execution, often raises questions in regard to the effect of engrafting this new article upon the provisions of the lease. Thus, in *Flint* v. *Brandon*, 1 New Rep. 73, where there was a covenant in a lease, that the lessee should not dig gravel out of any part of the demised premises, without the consent of the lessor, or paying 10*l.* *per* load, except what should be dug out of two acres, part of the demised premises, and part of a garden late in the occupation of A.; and by indorsement made before the execution of the lease, it was agreed that it should be lawful for the lessor to let any part of the premises for the purpose of making bricks or tiles, he paying the lessee 3*l.* for every acre he should so let; and further, that it should be lawful for the lessee to break up and dig for gravel in any part of the demised premises, he covenanting to pay the lessor 20*l.* for every acre he should so dig, at or before the expiration of the time, and to make good the same; the question was, whether the lessee was entitled to dig in the two acres of garden ground without making them good; and it was held, that he was not, for the memorandum was in general terms, and extended to every part of the land demised.

It was lately held to be no objection to treating an indorsement on a deed as part of it, that it was executed after the deed was signed, but before it was sealed and delivered; Lord *Ellenborough* observing, "that this was sufficient, since the whole was one transaction done at the same time." *Lyburn* v. *Warrington*, 1 Stark. 162.

Indorsement

But a memorandum indorsed upon a lease or other instrument *subse-*

quently to its execution, though it professes to refer to the intention of the parties at the time, is, to all intents, a new instrument, and must be executed and stamped accordingly.

INDORSEMENTS ON LEASES. made subsequently to execution, treated as a separate instrument.

Thus, in *Goodright* d. *Nicholls* v. *Mark*, 4 M. & S. 30, where a lease being granted in 1800 for twenty-one years, determinable by the lessor or lessee at the expiration of seven or fourteen years, the following memorandum was, after the death of one of the parties, indorsed on the deed: —"Memorandum of its being agreed by and between the parties within named, previously to the execution of the within deed, that the said lessor, her heirs or assigns, shall not dispossess nor cause the said lessee to *be dispossessed of the said estate, but to have it for twenty-one years from this time." The lessor's devisee, disregarding this memorandum, gave the lessee notice of her intention to determine the lease at the expiration of fourteen years, and then brought an ejectment. The defendant rested his defence on the last memorandum, as either dispensing with the proviso in the lease, or operating as a new lease; but it was held, that, not being under seal, it could not operate as a release of the proviso in the lease, and that it could only be a new lease by operating as a surrender of the former lease, which seemed plainly against the intention of the parties; for it could not be meant that a lease, without any rent or covenant, should be substituted for a lease that contained both. See also *Dowling* v. *Mill*, 1 Madd. 541.

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IX. LEASES, HOW TO BE STAMPED.

LEASES, HOW TO BE STAMPED.

Leases are now subject to two species of *ad valorem* duty; one on the amount of the rent reserved, and the other in respect of the fine or premium (if any). The latter was first imposed by the last general stamp act (55 Geo. 3, c. 184). The scale of duties is as follows:—

Stamp duty imposed by stat. 55 Geo. 3, c. 184.

Lease or tack of any lands, hereditaments, or heritable subjects, granted in consideration of a sum of money, by way of fine, premium, or grassum, paid for the same, without any yearly rent, or with any yearly rent under 20*l.* *(save and except leases and tacks for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, by whomsoever granted, and leases for a term absolute, not exceeding twenty-one years, granted by ecclesiastical corporations, aggregate or sole.*	*The same duty as for the conveyance on the sale of lands for a sum of money of the same amount*

Duty payable on Conveyances, to which Reference is above made.

Where the purchase or consideration money thereon or thereupon expressed, shall not amount to 20*l.*	0	10	0	Scale of *ad valorem* duties on premium.

LEASES, HOW TO BE STAMPED.

And where the same shall amount to	20*l.* and not to	50*l.*	1	0 0
——	50*l.* ——	150*l.*	1	10 0
——	150*l.* ——	300*l.*	2	0 0
——	300*l.* ——	500*l.*	3	0 0
——	500*l.* ——	750*l.*	6	0 0
——	750*l.* ——	1,000*l.*	9	0 0
——	1,000*l.* ——	2,000*l.*	12	0 0

(For the amount payable on larger sums, vide Act.)

—On rent.

Lease or tack of any lands, hereditaments, or heritable subjects, at a yearly rent, without any sum of money, by way of fine, premium, or grassum, paid for the same, where the yearly rent shall not amount to 20*l.* 1 0 0

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*And where the same shall amount to	20*l.* and not to	100*l.*	1	10 0
——	100*l.* ——	200*l.*	2	0 0
——	200*l.* ——	400*l.*	3	0 0
——	400*l.* ——	600*l.*	4	0 0
——	600*l.* ——	800*l.*	5	0 0
——	800*l.* ——	1,000*l.*	6	0 0
——	1,000*l.* or upwards		10	0 0

Lease or tack of any lands, hereditaments, or heritable subjects, granted in consideration of a sum of money by way of fine, premium, or grassum, and also of a yearly rent, amounting to 20*l.* or upwards, *(save and except the leases and tacks hereinbefore excepted).* — *Both the ad valorem duties payable for a lease, in consideration of a fine only, and for a lease in consideration of a rent only, of the same amount*

Lease or tack of any kind not otherwise charged 1 15 0

And for the counterpart or duplicate of any lease or tack charged with a duty not exceeding 1*l.* — *The like duty as on the lease or tack.*

And for the counterpart or duplicate of any other lease or tack whatsoever 1 10 0

And where any such lease or tack, counterpart or duplicate as aforesaid, together with any schedule, receipt, or other matter, put or indorsed thereon, or annexed thereto, shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, a further progressive duty of 1 0 0

Exemptions from the preceding and all other Stamp Duties.

Lease or tacks of waste or uncultivated lands to any poor or labouring persons, for any term not exceeding three lives, or ninety-nine years, where the fine shall not exceed 5*s.* nor the reserved rent one guinea *per annum*, and the counterparts or duplicates of all such leases.

Stamp only ap-

The *ad valorem* stamp imposed upon leases has been held to apply only

LEASES, HOW TO BE STAMPED. plies to considerations from lessee to lessor.

to considerations moving from the lessee to the lessor: and therefore, where A., having an agreement for a lease from the governors of a certain charity, contracted with B., in writing, in consideration of 170*l.*, to assign the lease to him when it should be obtained, and the lease was afterwards, with the assent of A., granted directly to B., without noticing the consideration which passed between them, and without an *ad valorem* stamp on the 170*l.*, it was held that this constituted no objection to the validity of the instrument. *Boone* v. *Mitchell*, 1 B. & C. 18.

Where several distinct rents are reserved (*a*) by the same lease, a duty *in respect of each rent should be affixed, and not for one rent of the aggregate amount. [*402]

Question, where there are several rents, whether a separate duty attaches for each rent, or one for the aggregate amount.

In a late case, indeed, where, by lease dated the 1st of November, 1819, A. demised a certain slate pit at S., and certain stone quarries on M. Hills to B., to hold from the respective periods thereinafter mentioned, viz. the slate pit from the 25th March, 1815, for fourteen years from thence next ensuing, and the stone quarries from the 29th of September, 1817, for a like term, from thence next ensuing, *yielding and paying in respect of the slate pit the yearly sum of* 70*l.*, *and also yielding and paying in respect of the stone quarries the yearly sum of* 130*l.*, by equal quarterly payments: the lease was stamped with an *ad valorem* stamp of 3*l.*, which was sufficient, treating the two rents as one; but it was objected, that, as it contained two distinct demises (*b*) of several properties, at distinct rents, commencing and concluding at different periods, they could not be included under one stamp, but required an *ad valorem* stamp of 1*l.* 10*s.* for the rent of 70*l.*, and 2*l.* for the rent of 130*l.* Lord C. J. *Dallas*—"The only objection raised at the trial was, that there had been two distinct and separate demises incorporated in one indenture of lease, and therefore required two stamps on the first skin. It appeared, that the defendant was let into possession of the slate pit at Lady-day, 1815; but that the *stone quarries had been previously let to another tenant, whose term would not expire until Michaelmas*, 1817, until which time possession could not be given to the defendant. It therefore appears to me that this may be considered as one letting, and one entire bargain, although the property demised was of two different descriptions, the one consisting of slate, and the other of stone, and consequently that they

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(*a*) As to whether a reservation is of one entire rent, or of several rents, see *Tanfield* v. *Rogers*, Cro. El. 340; *Beare* v. *Woodley*, Cro. Car. 154; *Knight's case*, 5 Rep. 54 b.

(*b*) The contrary might be inferred from the statement of the case; but the fact of there being one *testatum* clause, or more, containing the operative words of demise, it is conceived, is totally immaterial.

LEASES HOW TO BE STAMPED.

might be demised by one indenture of lease, and that the stamp of 3*l.* affixed to the first skin was sufficient, as required by the 55 Geo. 3, c. 184, Sch. Part 1; and more particularly so, as there was no ground for supposing, at the trial, that the parties had any idea of defrauding the revenue by using an improper stamp." *Boase* v. *Jackson*, 6 J. B. Moore, 480; *S. C.* 3 Brod. & Bing. 185.

Remarks upon *Boase* v. *Jackson.*

It will not be safe to consider this case as an authority for the position, that a subject matter, (whether consisting of one description of property or more), for which several distinct rents are reserved, can be included under one stamp. In regulating the *ad valorem* duty by the amount of the rent, the Legislature has made that the only test to be resorted to in

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*ascertaining the proper stamp; and the circumstance of there being one lessor and lessee, and the property being included in one lease, or one *testatum* clause, cannot vary the principle. In *Boase* v. *Jackson*, the Court seems to have been influenced by the evident hardship of the case, and the absence of intention to defraud the revenue.

As to rent to arise on the conversion of lands to tillage.

It has sometimes been doubted, whether the usual reservation of a rent, in the nature of a penalty, for every acre of pasture ground converted to tillage, subjects the lease to a stamp in respect of such reservation; but the better opinion is, that it would not; for it is impossible to know, at the time of the execution of the lease, whether such rent will ever arise; and the Courts have always manifested so strong a disposition to give the stamp acts as liberal and convenient an interpretation as possible, (of which the case just noticed affords a strong illustration), that it is extremely unlikely they would hold a stamp to be requisite in respect of rents of the nature in question.

As to the stamp where deed contains other matter.

It is important to observe, that where a lease, *under seal*, contains a distinct contract for the sale of goods, it is not enough, for the purpose of such contract, that it be properly stamped as a lease; it must, in order to be received in proof, be also stamped as a deed "not otherwise charged;" for, though agreements for the sale of goods are exempted from all duty by the act, yet this does not extend to agreements *under seal*. *Clayton* v. *Burtenshaw*, 5 Barn. & Cress. 41; *S. C.* 7 D. & R. 800. (The case, indeed, was decided upon another point, *vide ante*, p. 340; but the opinion of Mr. Justice *Bayley*, and more unequivocally that of Mr. Justice *Littledale*, were expressed to this effect.)

It may be noticed, that where an agreement for the sale of fixtures, in premises demised by that instrument, was insufficiently stamped as a lease, the Court refused to receive it as evidence in an action for the value of the fixtures, as the one agreement was dependent on the other, and "it was never intended that the lessee should buy the fixtures, if he should not have a lease of the premises." *Corder* v. *Drakeford*, 3 Taunt. 382.

Deed executed

It may not be out of place here to notice, that where a deed contain-

ed mutual covenants, which were in substance, that the plaintiff should relinquish his trade of a butcher in favour of the defendant, who was to be admitted into the house occupied by the plaintiff, and to be allowed to carry on the business there for ten years, in the joint names of the plaintiff and himself, and the defendant was to have possession of the whole house, with the exception of one room, and also the fixtures; for which the defendant paid 1000*l.* at the execution of the deed, and further covenanted to pay 1000*l.* *per annum*, for ten years; it was contended that this deed ought to have been stamped with an *ad valorem* duty upon conveyances under stat. 48 Geo. 3, c. 149; for, since the possession of the house was given for ten years, and the fixtures were included, the transaction was to *be considered as a sale of these interests; but it was held that the duty did not attach. "The agreement is," said Lord *Ellenborough*, "that the defendant shall have these as auxiliary to carrying on his business; and since there is no mention of any distinct substantive property, exclusive of the trade, I cannot think that, in fair construction, it falls within the operation of this clause of the act." *Lgburn* v. *Warrington*, 1 Stark. 162.

LEASES, HOW TO BE STAMPED on the relinquishment of a business, what stamp requisite.

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X. AS TO TENANCIES FROM YEAR TO YEAR, HOW CREATED.

TENANCIES FROM YEAR TO YEAR, HOW CREATED.

A general letting at an annual rent, without any limitation as to time, creates, in construction of law, a tenancy from year to year (*a*), which is the most ordinary species of letting in modern times, having in a great measure superseded tenancies at will, which formerly were held to arise under circumstances of this nature. *Agard* v. *King*, Cro. El. 775; *Bowes's case*, Alleyn, 4; *Legg* v. *Strudwick*, 2 Salk. 414; *Timmins* v. *Rowlinson*, 3 Burr. 1609; *Roe* d. *Bree* v. *Lees*, Blackst. Rep. 1172; *Doe* d. *Shore* *Porter*, 3 D. & E. 16; *Rex* v. Inhabitants of *Stone*, 6 D. & E. 297. See also 7 D. & E. 85. And it is immaterial whether the rent be reserved half yearly or quarterly. See 4 Taunt. 131.

General letting.

So, where a person is let into possession under a parol demise, which is void on account of its being for a longer period than is allowed by the statute of frauds, *i. e.* for more than three years, he is tenant from year to year. *Clayton* v. *Blakey*, 8 D. & E. 3. Such, at least, is the rule where rent has been paid (*b*). What is the nature of the tenancy before any

Void parol demise.

(*a*) But as to the construction of an agreement for a lease, where the term is not expressed, see *Browne* v. *Warner*, *ante*, p. 336; *Anon.* 4 Leon. 34.

(*b*) It is to be inferred, in *Clayton* v. *Blakey*, that rent had been paid. In *Knight* v. *Benett*, 3 Bing. 361, also, rent had been paid; but some of the Judges seem to have thought it would have been a tenancy from year

TENANCIES FROM YEAR TO YEAR, HOW CREATED.

such payment has been made, seems to be a debateable point. See Chamb. *Land. & Ten.* 285. Lord *Kenyon* certainly thought that a tenancy *at will* was created in such a case. See *Doe* d. *Hollingsworth* v. *Stennett*, 2 Esp. 717. Considering, however, the strong leaning of the Courts in favour of tenancies from year to year, on account of their obvious convenience, as distinguished from tenancies at will simply, it seems to be more probable that a person thus let into possession would be held to be tenant from year to year; at all events, the tenancy, whatever be its nature, is subject to the terms of the intended demise in all respects except as to its duration.

Void lease, in intended execution of a power.

Upon a similar principle, where a tenant for life, with a power of leasing, makes a lease in intended execution of his power, but which is void [*105] *against the remainder-man for non-compliance with the requisitions of the power, the acceptance of rent by the remainder-man (which, it is well known, does not operate to confirm the lease (*a*),) creates a tenancy from year to year. *Sykes* d. *Murgatroyd* v. ———, cit. 1 D. & E. 161; *Doe* d. *Jordan* v. *Ward*, 1 H. Bl. 97; *Doe* d. *Martin* v. *Watts*, 7 D. & E. 83; *Denn* d. *Brune* v. *Rawlins*, 10 East, 261.

And if the reversioner or remainder-man accept the rent as due on the days of payment at which it was reserved by the lease, this will be conclusive evidence of the holding being from the same period of the year as under the lease, and not from the death of the tenant for life. *Roe* d. *Jordan* v. *Ward*, 1 H. Bl. 97.

Where lessee holds over, and lessor accepts rent.

Another case, in which the species of tenancy under consideration arises, is, where a lessee for a definite term holds over after the expiration of his lease, and the lessor accepts rent from him; in which case, though the payment of rent were for a single quarter only, he becomes tenant from year to year, and cannot quit or be ejected without notice. *Bishop* v. *Howard*, 2 Barn. & Cress. 100; *S. C.* 3 Dowl. & Ryl. 293; see also *James* v. *Dean*, 11 Ves. 395. But see *Freeman* v. *Jury*, 1 Moody & Malkin, N. P. Rep. 19. And the terms of the new holding will be considered to be the same as those of the expired lease, (*Doe* d. *Spicer* v. *Lea*, 11

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to year, independently of that circumstance, after an occupation for *more than a year*. The Editor is not aware that this distinction, in regard to the *length* of the occupation, occurs in any antecedent case.

(*a*) It deserves consideration how far the doctrine before noticed, (p. 360), that leases, which had been subject to the operation of a proviso declaring them void on a given event, are nevertheless unimpeachable by the lessor after the acceptance of rent, in opposition to the old rule, applies to the cases in question. The principle certainly seems to extend to them; but it is probable that the judges would consider the question as concluded by the authorities.

East, 312), even though there be a variation in some particulars, as by an advance of rent. *Digby* v. *Atkinson*, 4 Camp. 275.

TENANCIES FROM YEAR TO YEAR, HOW CREATED.

It has also been established, that where a tenant enters under an agreement for a lease, and pays rent, this creates a tenancy from year to year *at law*, upon the terms of that agreement. This point was assumed in the case of *Coupland* v. *Maynard*, 12 East, 134, and was more distinctly recognised in *Rawling* v. *Tempest*, 13 East, 18, where a landlord brought an action against a tenant for mismanagement of a farm, which had been agreed to be let to him upon lease, and it was objected that the plaintiff had declared upon a present demise, whereas, the instrument was an agreement only; but Lord *Ellenborough* answered the objection by saying, *that the plaintiff let the defendant into possession, and received rent from him.* The Court refused to disturb a verdict which the plaintiff had obtained.

Where tenant enters under an agreement for a lease, and pays rent.

So, in *Doe* d. *Oldershaw* v. *Breach*, 6 Esp. 106, where the tenant was let into possession under an agreement for a lease, which was to contain certain covenants, with a right of re-entry on breach, and the tenant had *broken some of the intended covenants, *Macdonald*, L. C. B., held, that [*406] the landlord was entitled to recover in ejectment, on the ground that this was, at law, a letting from year to year, subject to the terms of the agreement; and though he expressed his own doubts upon the soundness of the doctrine, he considered it to have been established by the case of *Doe* d. *Bromfield* v. *Smith*, 6 East, 530. Some exception may be taken to the particular case which the learned Chief Baron cited in support of the doctrine; for, in *Doe* v. *Smith*, the action was brought by the landlord, who had let a tenant into possession under an agreement, which the Court held would have entitled him to a lease for the joint lives of himself and the lessee; and the ejectment was brought by the lessor, after the death of the tenant, against his executors, who objected, that the instrument operated as either a present demise, (which the Court unhesitatingly denied, *vide ante*, p. 336), or that it created a tenancy from year to year, which remained undetermined, they (the executors) not having received notice to quit: but the Court held, that the possession of the tenant during his life was to be referred to the agreement; and as, under such agreement, he would have been entitled to a lease for the joint lives of himself and the lessor, which had determined by the death of the tenant, the plaintiff ought to recover. This case, therefore, so far as it goes, seems to be an authority *against* the tenancy from year to year, unless the tenancy created in such cases is considered as ending with the event or period at which the lease to be executed under the agreement would have terminated, which is questionable. But, putting the case of *Doe* v. *Smith* out of the question, the doctrine that a tenant entering under an agreement for a lease, and paying rent, holds from year to year under the stipulations of that agreement, is too well established now to be shaken.

TENANCIES FROM YEAR TO YEAR, HOW CREATED.

Tenancy from year to year under agreement for a lease.

In addition to the authorities before mentioned, there is the late case of *Doe* d. *Lloyd* v. *Powell*, 8 Dowl. & Ryl. 35; *S. C.* 5 Barn. & Cress. 312, where a tenant entered under an agreement for a lease which was to contain a proviso for re-entry on assignment, and he having (it was alleged) broken the condition by assigning the lease, an ejectment was brought by the landlord; and the only question discussed was, whether the condition was broken, (as to which *vide ante*, p. 363), it being assumed on all hands, and expsessly admitted in the judgment of the Court, that the defendant *was tenant from year to year, subject to the condition in question.* So, in *Mann* v. *Lovejoy*, 1 Ryan & Moody, 355, a distress on the goods of a tenant, who was let into possession under an agreement for a lease, *and who had paid rent*, was sustained. Though originally, therefore, this doctrine might have been considered as resting upon very fragile grounds, and has sprung up rather unobservedly, it is not now open to question. And it is to be observed, that although the agreement for a lease does not specify the rent to be paid, yet, if a rent be paid during the holding under it, this creates a tenancy from year to year, and entitles the landlord to distrain for arrears of rent at the rate previously paid. *Knight* v. *Bennett*, 11 Moore, 222.

But a tenant who enters under an agreement for a lease, is not for *all* purposes considered as a tenant from year to year; for it has been held, that, at the expiration of the term contracted for, he may be ejected without a notice to quit, being, in this respect, regarded as standing in the same situation as if the lease had been granted. *Doe* d. *Tilt* v. *Stratton*, 1 Moore & Payne, 183.

Tenancies at will may be created by express contract.

Notwithstanding, however, that, in the several instances before stated, we have seen that a tenancy from year to year results, wherever the relation of landlord and tenant is established indefinitely in regard to duration, yet, it is clear, that a tenancy at will *may* be created by *express contract;* [*407] *and this construction was lately given to a tenancy which was to endure for so long time as the parties respectively pleased, (not *from year to year*, so long, &c. which has often been mentioned as descriptive of a tenancy from year to year. See Cro. El. 775; 3 D. & E. 16;) *Richardson* v. *Langridge*, 4 Taunt. 128.

Tenants at will cannot be ejected without demand of possession.

A tenant at will, it should be observed, though not entitled to a prospective notice to quit, as in the case of a tenant from year to year, cannot be ejected by legal process without a previous demand of possession; for, the possession being originally lawful, the owner is not at liberty to treat the tenant as a trespasser without such a demand; and the admission of the fictitious lease, &c. by the consent rule, in an ejectment, does not apply to such a case. See *Right* d. *Lewis* v. *Beard*, 13 East, 210. And therefore it has been repeatedly determined, that, where a person is let into possession under a contract for a purchase, (a step which no well advised vendor ever consents to), the owner cannot evict him without a pre

vious demand of possession. *Right* d. *Lewis* v. *Beard*, 13 East, 210; *Doe* d. *Newby* v. *Jackson*, 2 Dowl. & Ryl. 414. As to the right to maintain an action for the use and occupation in such a case, see *Kirtland* v. *Pounsett*, 2 Taunt. 145; Sugd. Vend. 218.

TENANCIES FROM YEAR TO YEAR, HOW CREATED.

In regard to tenancies from year to year, it is further to be observed, that, in order to constitute such a tenancy, an actual or implied letting is necessary; and, therefore, where a person obtained possession of a house which was empty, without the privity of the landlord, intending to take a lease of it from him, and some negotiation afterwards took place between them upon the subject, but they disagreed about the valuation of the fixtures: Lord *Ellenborough* held, that the relation of landlord and tenant never subsisted; if it was a tenancy of any sort, it was a tenancy at sufferance, and no notice to quit was necessary. See *Doe* d. *Knight* v. *Quigley*, 2 Camp. 504.

Possession under circumstances held not to create a tenancy.

So, if a tenant, whose lease is expired, be permitted to continue in possession, pending a treaty for a renewal, he does not thereby become a yearly tenant, unless rent has been received, but so strictly at will that he may be turned out of possession without notice; *Doe* d. *Hollingsworth* v. *Stennett*, 2 Esp. 717; though he is entitled, we have seen, to a demand of possession.

Where the letting is of apartments only, the presumption is less favorable to a tenancy from year to year, than in the other cases, such a transaction being contrary to the usual mode of letting lodgings. Thus, in *Wilson* v. *Abbott*, 3 Barn. & Cress. 88; *S. C.* 4 D. & R. 693, it appeared that A., at Michaelmas, 1822, let apartments in his dwelling-house to B. at the rent of 45*l.*, payable half yearly; B. took possession, and at Lady-day, 1823, paid a half year's rent. On the 23rd of June, 1823, B. left the apartments without giving any notice to quit, and tendered to the landlord one quarter's rent to the then Midsummer, which he refused to accept; and when Michaelmas came, demanded a half year's rent, which B. paid. At Lady-day, *1824, A. demanded another half year's rent, [*408] which B. refused to pay; upon which this action was brought. *Abbott*, C. J.—" According to the ordinary practice, lodgings are not usually let for so long a period as a year, and we are now called upon to infer the existence of a contract continuing for two years at least (*a*), contrary to the general usage. *If the defendant* (*B.*) *had continued to occupy the apartments after the commencement of the second year, there would have been ground for inferring a contract for a tenancy continuing from year to year*, for it might reasonably be supposed that he continued in possession in pursuance of the contract made. But here, the tenant quits during the current year, having, in the first instance, paid a half-year's rent, and offered to pay rent for the current quarter in which he quitted; and

Presumption of tenancy from year to year, less favoured in regard to lodgings.

(*a*) But a tenancy from year to year is not necessarily a tenancy for two years. It may be determined by notice at the expiration of the first year.

TENANCIES FROM YEAR TO YEAR, HOW CREATED.

he afterwards consents to pay the rent for the current year in which he quitted, but refuses to pay it for a longer period. *The inference arising from these facts is, that the tenant considered himself a tenant for one year and no longer.*"

Compositions for tithes must be determined by notice.

It should be observed, that, to determine a composition for tithes, which is indefinite as to its duration, the same notice is necessary as in the case of a tenancy from year to year; *Bishop* v. *Chichester*, 3 Eagle & Y. Tithe Cases, 1354; *Wyburd* v. *Tuck*, 1 Bos. & Pull. 458; *Doe* d. *Morgan* v. *Church*, 3 Camp. 71; see also *Cox* v. *Brain*, 3 Taunt. 95; unless, it should seem, where the compositions have been attempted to be established as moduses; though, upon this point, the cases appear to be contradictory. *Hume* v. *Wright*, Gwillim, 1217, 1221; *Fell* v. *Wilson*, 12 East, 83; *Bower* v. *Major*, 1 Brod. & Bing. 4. See also *Atkyns* v. Lord *Willoughby*, Anstr. 397; *Adams* v. *Waller*, 12 East, 84, n.

TENANCIES FROM YEAR TO YEAR, HOW DETERMINED.

Notice to quit, when necessary.

TENANCIES FROM YEAR TO YEAR, HOW DETERMINED; AND AS TO NOTICES TO QUIT.

Where lands are demised for a definite term, no notice to quit at the end of the term is necessary, but the relation of landlord and tenant ceases between the parties at that period, and the tenant continuing in possession might thenceforth be treated as a trespasser. A tenancy from year to year, however, is a continuing interest until determined on one side or the other by notice; and this necessity of notice, which applies as well to the first as to every succeeding year of the tenancy, forms one of the principal characteristics of this species of interest, and generally raises the question in regard to its creation. The death of a tenant from year to year, it is clear, has no effect upon the tenancy, which vests in his personal representatives; *Doe* d. *Shore* v. *Porter*, 3 D. & E. 13; and see *Agard* v. *King*, Cro. El. 775, (in which respect it differs from a tenancy

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*at will, which is determined by the death of either party; see 11 Ves. 391); and it may be observed, that the interest which devolves upon executors or administrators under a tenancy from year to year, and it seems even the benefit they derive from succeeding to the lands without a title, as where the tenancy is at will or by sufferance, is a trust for the persons beneficially entitled. See *James* v. *Dean*, 11 Ves. 392; also *Randall* v. *Russell*, 3 Mer. 190.

Tenancy from year to year not affected by death, &c.

A tenancy from year to year is, of course, equally unaffected by the death of the lessor, unless, indeed, his interest in the lands determined on that event, in which case, the tenancy is necessarily at an end. And, upon this principle, it was lately held, that where the incumbent of a living let the glebe lands to a tenant from year to year, his successor might eject the tenant without any previous notice to quit. *Doe* d. *Kerby* v. *Carter*, 1 Ryan & Moody, 237. The same rule, it is evident, applies to compositions for tithes. *Brown* v. *Barlow*, 2 Eag. & Younge, 19; *S. C.* Gwill. 1001. But where the succeeding incumbent permitted the ten-

ants of the glebe lands to continue in possession for eight months after the death of his predecessor, he was considered to have assented to the continuance of the tenancy on the same terms as before, and it was held that he could not eject the tenants without notice. *Doe* d. *Cates* v. *Somerville*, 6 Barn. & Cress. 129; *S. C.* 9 D. & R. 100.

TENANCIES FROM YEAR TO YEAR, HOW DETERMINED.

Persons claiming under the lessor or lessee, by grant or assignment, (whether by way of mortgage or otherwise), are of course bound to give, and entitled to receive, the same notice as the lessor or lessee himself. See *Birch* v. *Wright*, 1 D. & E. 378.

A tenant, who has attorned to a stranger, or done any other act renouncing the tenancy, may be evicted as a trespasser without any previous notice. But where there are conflicting claims by persons *who profess to derive their title from the original lessor*, as between an heir-at-law and devisee, a refusal by the tenant to pay the rent to one claimant, where it was accompanied by an expression of willingness to pay the rent to the person entitled to receive it, was held to be no disavowal of the title of his landlord, so as to deprive the tenant of his right to a regular notice. *Doe* d. *Williams* v. *Pasquali*, Peake, N. P. 259.

Tenant disclaiming the tenancy may be evicted without notice.

A tenant, who is threatened with proceedings to compel payment of rent, by several adverse claimants, may protect himself by a bill of interpleader, provided it involve no denial of his landlord's title; *Clarke* v. *Byne*, 13 Ves. 383; but he must be careful not to collude with either claimant. These suits, however, are not of very frequent occurrence; because, as the costs of the tenant come out of the fund, it is obviously the interest of the contending parties that some amicable arrangement should be made, under which the tenant may safely pay his rent, for the benefit of the claimant to whom it may eventually be decided to belong.

Tenant may file a bill of interpleader in case of adverse claims.

NOTICES TO QUIT.

In regard to the question, what is a sufficient notice to determine a tenancy from year to year, the following points have been determined:—

What is a sufficient notice to determine a tenancy from year to year.

That it must be a half-year's notice, and must expire at the period of the year at which the tenancy commenced. *Gulliver* d. *Tasker* v. *Burr*, 1 Blackst. Rep. 596; *Roe* d. *Jordan* v. *Ward*, 1 H. Bl. 197; *Right* d. *Flower* v. *Darby*, 1 D. & E. 159; *Leighton* v. *Theed*, 1 Lord Raym. 707. And the same rule has been held to apply to compositions for tithes. *Hewit* v. *Adams*, 7 B. P. C., Toml. ed. 64 (*a*). And it is immaterial whether the letting was from one of the general quarter-days, or from any other day; and, therefore, where a tenant entered on the 29th day of October, under an agreement that he should "always be subject to quit at three months' notice," (and which was held to create a *quarterly*

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(*a*) That such agreements for the retainer of tithes by parol are good, *vide Hewit* v. *Adams*, 7 B. P. C., Toml. ed. 64.

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tenancy), Lord *Ellenborough* held, that the quarterly notice should expire on the 29th of January, the 29th of April, the 29th of July, or the 29th of October: for though the tenant might have been made to hold from the preceding or succeeding general quarter-day, yet, in the absence of all evidence to the contrary, his Lordship was bound to presume that he held from the time when he entered as tenant. *Kemp* v. *Derrett*, 3 Camp. 509. Though the tenancy in this case was a quarterly tenancy, it is obvious that the same principle applies to a tenancy from year to year.

As to the expiration of the tenancy, where tenant enters in the middle of a quarter.

But where the tenant entered in the middle of a quarter, upon an agreement "to pay rent quarterly, and for the half-quarter," it was left to the jury to say whether the party was tenant from the quarter-day prior to the time when he entered, or from the succeeding quarter-day; and under the direction of Lord *Ellenborough*, the jury found that the tenancy commenced from the *preceding* quarter. *Doe* d. *Hadmore* v. *Selwyn*, 47 Geo. 3, Adams on Ejectment, 129.

The general rule, however, seems to be, that if a tenant enters in the middle of a quarter, and pays rent for the fractional period of the current quarter, *from the end of which quarter he pays half-yearly*, (which is a very frequent arrangement), his tenancy commences from the regular quarter-day to which he paid up; and in order to dissolve the tenancy, the half-year's notice to quit must expire at that period. *Doe* d. *Holcomb* v. *Johnson*, 6 Esp. 10.

Notice must be from quarter-day to quarter-day.

The half-yearly notice to determine a tenancy which commenced at any general quarter-day should be from the preceding penultimate quarter-day; and it is no objection to such notice that the interval between these days consists of less than a moiety of three hundred and sixty-five days, or than six calendar months. Thus, a notice given at Michaelmas-day, to quit at the following Lady-day, is sufficient, though it include a hundred and seventy-seven days only, which is less than half the year. *Doe* d. *Harrop* v. *Green*, 4 Esp. 199. And by parity of reasoning, a previous notice of six calendar months, or of the number of days included in half the year, will *not* be sufficient, if it do not extend from quarter-day to quarter-day. See 1 D. & E. 163. But the Courts, it seems, will construe a notice to quit, at the expiration of "six calendar months," as a half-yearly notice; and, therefore, such a notice given from Lady-day has been held to be a good notice to quit at Michaelmas; and Lord *Ellenborough* observed, that if the word "calendar" had been omitted, it would have been equally good. *Howard* v. *Hemsley*, 6 Esp. 53.

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(A popular notion prevails, that a notice to quit must be served before twelve o'clock at noon, on the quarter-day, but this is not correct; for the law does not in general recognise fractions of a day, and a service at any time before midnight, when the day expires (or at all events before sunset), would be good).

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The fact of the rent being reserved quarterly is no dispensation with a half-year's notice. *Shirley* v. *Newman*, 1 Esp. 766; and see *Brown* v. *Burtenshaw*, 7 Dowl. & Ryl. 603.

Reservation of rent quarterly, does not vary the rule.

But a custom may be shewn in favour of a longer or shorter notice; *Roe* d. *Brown* v. *Wilkinson*, Harg. & Butl. Co. Lit. 270. b., n.; *Roe* d. *Henderson* v. *Charnock*, Peake, 4; *Tyley* v. *Seed*, Skinn. 649; and see 3 Burr. 1609, as well where the letting is under a written agreement, (the agreement, of course, being silent on the subject), *Brown* v. *Burtenshaw*, 7 Dowl. & Ryl. 603, as where it is not reduced to writing.

Rule may be varied by custom.

By the custom of London, it seems, a half-year's notice is requisite of messuages of above 40*s.* rent, and a quarter's notice where the rent is under that sum. *Tyley* v. *Seed*, Skinn. 649.

Custom of London.

It has been held, that in the case of a parol demise, with a stipulation that the rent shall take place from the following Lady-day, evidence is admissible that, by the custom of the country, *old* Lady-day must have been intended. *Doe* d. *Hale* v. *Benson*, 4 Barn. & Ald. 588. But *contra*, it seems, where the lease is *by deed*. *Doe* d. *Spicer* v. *Lea*, 11 East, 312.

Parol evidence.

An express stipulation varying the *length* of the notice to be given, does not interfere with the rule regulating the period of its *expiration;* and, therefore, if parties agree that the tenancy shall be determinable at a quarter's notice, such notice must, in the absence of agreement or custom to the contrary, (see 7 Dowl. & Ryl. 611), expire at that period of the year, at which the tenancy commenced. *Doe* d. *Pitcher* v. *Donavan*, 1 Taunt. 555; *S. C.* 2 Campb. 78.

Notice must expire at the end of the year, notwithstanding variation as to length.

It not unfrequently happens, that a tenant enters upon the several parts of the demised premises at different times of the year, which raises the question, which is to be considered as the period of entry, for the purpose of regulating the commencement and determination of the tenancy.

Question where tenant enters upon different parts at different times.

In the case of farms, where the tenant (as is often the case), enters upon the arable land before the quarter-day, for the purpose of sowing and preparing it, the tenancy generally commences from the next quarter-day, from which period the rent is payable. *Doe* d. *Dagget* v. *Snowdon*, 2 Blackst. 1224; *Doe* d. *Strickland* v. *Spence*, 6 East, 120.

Relative value must often be resorted to, for the purpose of determining *which is the principal, and which the auxiliary subject of demise, and the conclusion is, in all cases, matter for the consideration of a jury. *Doe* d. *Heaper* v. *Howard*, 11 East, 488. [*412]

In *Doe* d. *Bradford* v. *Watkins*, 7 East, 551, a dwelling-house and some buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching grounds, &c. were demised in the month of January, for thirty-five years, to commence, as to the meadow, from the 25th of December then last; as to the pasture, from the 25th of March next; and as to the housing, mills, and all the rest of the premises, from the first of May; reserving the first half year's rent on

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the feast-day of Pentecost, the other at Martinmas: and it was held, that the substantial time of entry, to which the notice ought to refer, was the 1st of May, when the house and manufacturing buildings were entered upon, and not the 25th of December when the meadow, or the 25th of March, when the pasture, which were merely auxiliary to the other and principal subject of demise, were entered upon.

As to lettings by the month, &c.

Where houses or lodgings are let from month to month, or week to week, a month's or week's notice is required to determine the letting, *Doe* d. *Parry* v. *Hazell*, 1 Esp. 94, unless a longer or shorter notice be stipulated for; *Doe* d. *Peacock* v. *Raffan*, 6 Esp. 4; and by the same rule which governs tenancies from year to year, the notice, in such cases, whatever be its duration, must expire at the end of the month, &c. See *Kemp* v. *Derrett*, 3 Camp. 509. Thus, if the letting is from month to month, determinable at a week's notice, the notice must expire at the end of the month.

No local description necessary.

No local description is necessary in a notice: it is sufficient that the premises be referred to as those which the tenant holds of the landlord. *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5. And even if the notice purport to describe the premises, an error in some of the particulars will not vitiate the notice, provided a doubt is not thereby raised as to the identity. *Doe* d. *Cox* v. ———, 4 Esp. 185.

Notice need not enumerate all the subjects of demise.

Nor need all the several subjects of demise (where more than one) be specifically referred to. Thus a notice to quit a messuage, "farm, lands and premises, with the appurtenances," has been held to include tithes. *Doe* d. *Morgan* v. *Church*, 3 Camp. 71. And even where a more detailed description has been commenced, but not proceeded in, the same liberal construction has prevailed, the intention to include the whole being apparent. Thus, where a farm, described as consisting of Town Barton, (in which the mansion-house, orchard, &c. were situate), Shippen Barton, and several other closes, was demised for twenty-one years, determinable by either party at the end of fourteen years, on two months' notice, and the lessor, within the prescribed period, gave the lessee notice to quit "Town Barton, *&c.* on the expiration of the fourteenth year of your term, *agreeably to the terms of the covenant between us*"—it was held, that though Town
[*413] *Barton did not include the principal part of the farm, yet that the notice was sufficient. "It meant," Lord *Ellenborough* said, "the Town Barton *cum sociis;* especially with reference to the lease, which only gave him power to determine the tenancy as to the whole of what was let together." *Doe* d. *Rodd* v. *Archer*, 14 East, 245.

Palpable mistake immaterial.

A mistake, evidently arising from a mere slip of the pen, will not vitiate a notice; and, therefore, where a notice was given to a tenant at Michaelmas, 1795, to quit at Lady-day, "which will be in the year 1795," it was decided to be a good notice to quit at Lady-day, 1796, the words "will be" shewing that 1795 could not be meant. *Doe* d. Duke of

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Bedford v. *Knightley*, 7 D. & E. 63. And, where persons who were entitled to the reversion as devisees in trust, and who were also appointed executors, inaccurately gave the notice in the character of executors, Lord *Ellenborough* was of opinion, that the error was immaterial. *Right* d. *Fisher* v. *Cuthell*, 5 Esp. 149.

Notice may be signed by one joint-tenant on behalf of the whole.

Where several persons are interested in the reversion, as joint-tenants, (whether in the character of trustees or otherwise), the notice to quit need not be signed by all; if given by one of them only, on behalf of the others, it is sufficient (*a*); *Doe* d. *Aslin* v. *Summerset*, 1 Barn. & Adolph. 135, overruling Lord *Ellenborough's dictum* in *Doe* d. *Fisher* v. *Cuthell*, 5 East, 496. See also *Goodtitle* d. *King* v. *Woodward*, 3 B. & A. 689.

Contra as to notice to determine lease, which is required to be under the hand of the lessor.

But a notice for determining a lease which is required to be under the hand of the lessor, must, it seems, be signed by all the persons who are jointly interested in the reversion as executors or otherwise; and the subsequent adoption of the notice by the party who did not sign, evidenced by his joining in the ejectment, will not cure the defect, as the tenant is entitled to a notice on which he can depend as binding all the parties interested at the time. *Right* d. *Fisher* v. *Cuthell*, 6 Esp. 149; *S. C.* nom. *Doe* d. *Fisher* v. *Cuthell*, 5 East, 496.

Joint-tenants who have signed may recover their shares.

Where a notice operates as the notice of part only of the lessors, being joint-tenants, those who have signed may recover their respective shares, since it is competent to any joint owner to put an end to a joint demise in respect of his share; and this applies as well in the case of trustees as of persons seised in their own right, (though the contrary is assumed, Com. *Landl. & Ten.* 278), as a Court of law can take no notice of trusts (*b*). *Doe* d. *Whayman* v. *Chaplin*, 3 Taunt. 120.

Notice from receiver empowered *to let* good.

It seems, that an authority to let includes an authority to determine tenancies; and, therefore, a notice given by a receiver appointed by the Court of Chancery, with power to let estates, to a tenant of such estates, has been held to be good. *Doe* d. *Marsack* v. *Read*, 12 East, 57. And a person authorized to let would probably be considered as competent to receive notices from the tenants. In *Shirley* v. *Newman*, 2 Esp. 266, before Lord *Kenyon*, it was assumed, that a notice to the person who received the rents of the estate was sufficient. A contrary rule would be very inconvenient.

Notice in writing not necessary.

Though it is usual (and, on account of the facility of proof, in general advisable), to give notices, which are intended to determine tenancies

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(*a*) That one of several joint-tenants or coparceners may *distrain* on behalf of the whole, without any express authority, see *Pullen* v. *Palmer*, 5 Mod. 72; *Page* v. *Stedman*, Carth. 364; *Leigh* v. *Shepherd*, 2 Brod. & Bing. 465; *Robinson* v. *Hoffman*, 4 Bing. 562.

(*b*) See an observation, *ante*, p. 153.

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from year to year in writing, yet a parol (*a*) notice is clearly sufficient for the purpose. *Timmins* v. *Rowlinson*, 3 Burr. 1603; *S. C.* Blackst. 583; *Doe* d. Lord *Macartney* v. *Crick*, 5 Esp. 196; *Roe* d. Dean and Chapter of *Rochester* v. *Pierce*, 2 Camp. 96.

Personal service not necessary.

Nor is it necessary that the notice be personally served on the tenant, provided a fair presumption can be raised of its having reached his hands; and delivery to a servant, (to whom the nature of it was explained), at the dwelling-house, though not on the demised premises, has been held to raise this presumption; *Jones* d. *Griffiths* v. *Marsh*, 4 D. & E. 464; for, if the fact were otherwise, the servant might be called to prove it. See 5 Esp. 154. But the mere proof of the leaving of the notice at the tenant's house is not sufficient. *Doe* d. *Buross* v. *Lucas*, 5 Esp. 153. The fact, however, of the servant being dead before the trial, and therefore incapable of being called, does not invalidate the notice. *Doe* d. *Neville* v. *Dunbar*, 1 Moody & Malkin, 10.

Where there are several persons interested jointly as lessees or tenants, it seems that a notice to one is sufficient, as it will be presumed to have reached the other tenant. See 7 East, 553; 5 Esp. 197.

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Notice to quit at the end of the current year, good.

*It is not necessary that the notice should be to quit on a specific day; it may refer to one of two alternative days: *Doe* d. *Matthewson* v. *Wrightman*, 3 Esp. 6; or may be in general terms, to quit at the expiration of the current year of the tenancy. *Doe* d. *Baker* v. *Wombwell*, 2 Camp. 559. Thus, a notice to quit "*at the expiration of the current year of the tenancy, which shall expire next after the end of one half year from the date hereof*," has been held to be a good notice. *Doe* d. *Phillips* v. *Butler*, 2 Esp. 589. These, therefore, are the terms in which a notice given under such circumstances should be expressed; but the advantage which a more definite notice has over such a general one, is, that if there is any doubt of the landlord being able to prove when the tenancy commenced, he may, under a notice to quit at a specified time, avail himself of the tenant's assent or non-objection to the notice, as raising the presumption of that being the period at which the tenancy commenced; for it seems to be clear, that if the tenant does not, at the time of the delivery of the notice, object to the time stated, it is *primâ facie* evidence of that being the right period of determining the tenancy; and the production of receipts shewing the payment of rent as due at that period of the year, would, in that case, be sufficient evidence on an ejectment. *Doe* d. *Clarges* v. *Foster*, 13 East, 405; *Doe* d. *Baker* v. *Wombwell*, 2 Campb. 559; *Doe* d. *Leicester* v. *Biggs*, 2 Taunt. 109. But, in order to raise this presumption, an acqui-

Effect of acquiescence in notice.

(*a*) The word "parol" is here used, in compliance with frequent usage, in the sense of *oral;* though, properly speaking, it is applicable as well to any writing which is not under seal.

NOTICES TO QUIT, UNDER TENANCIES FROM YEAR TO YEAR.

essence in the notice must be proved; see *Doe* d. *Ash* v. *Calvert*, 3 Camp. 387; and the expedient ought, if it can be avoided, never to be relied on, even though the notice were personally served: for if it should appear from the examination of the witness serving the notice, that the tenant did not look at it, so as to know its contents, the presumption of acquiescence would be rebutted. See 13 East, 407.

What amounts to an acquiescence.

But, it seems, that where a tenant keeps the notice, whether served personally or left at his house, it is in general an acquiescence in the sufficiency of it. See *Shirley* v. *Newman*, 2 Esp. 267. *A fortiori*, if he use expressions upon receiving the notice admitting its sufficiency; but the Courts will not strain ambiguous expressions into an implied assent; and, therefore, where a tenant said, "I pay rent enough already, and it is hard to use me thus," these words were held not to amount to an acceptance of the notice—they were merely the expressions of an angry man. *Oakapple* d. *Green* v. *Copous*, 4 D. & E. 361. But, where a notice was served on a tenant on the 22nd of March, to quit at the expiration of the current year; and the declaration in ejectment was served on the 16th of January, when the defendant made no objection to the notice to quit, nor set up any right to the possession of the premises, but said he should go out as soon as he could suit himself with another house, Lord *Ellenborough* thought that the tenant had admitted the tenancy to have been determined by the notice. *Doe* d. *Baker* v. *Wombwell*, 2 Camp. 559.

Tenant bound by his own statement respecting the commencement of the tenancy.

Where a tenant, upon being applied to on behalf of the lessor, to know when his holding commenced, stated a particular period, and the notice *was given accordingly, he was held to be precluded from impeaching the notice by shewing the tenancy to have commenced at any other period. And it is immaterial whether the inaccuracy of the information proceeded from mistake or design. *Doe* d. *Eyre* v. *Lambly*, 2 Esp. 635.

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Need not be directed to tenant.

Lastly, it remains to be observed, that the notice, when personally served on the tenant, need not be directed to him; *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5; and, if directed, an inaccuracy in the Christian name is not material; at all events, if he accept the notice. *Roe* v. *Spiller*, 6 Esp. 70.

Error in Christian name.

WHAT AMOUNTS TO A SURRENDER OF TENANCY FROM YEAR TO YEAR.

TERMINATION OF TENANCY FROM YEAR TO YEAR, BY SURRENDER.

What a surrender of a tenancy from year to year.

Another mode by which a tenancy from year to year may be determined is by surrender. Before the statute of frauds, 29 Car. 2, c. 3, surrenders might have been made without writing; but that statute, section 3, enacted, "that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be surrendered, unless it be by deed, or notice in writing, signed by the party so surrendering the same, or his agent thereunto lawfully authorized by writing, or by act and operation of law."

WHAT AMOUNTS TO A SURRENDER OF TENANCY FROM YEAR TO YEAR.

This has been held to extend to tenancies from year to year. *Mollett* v. *Brayne*, 2 Camp. 103; see also *Doe* d. *Read* v. *Westlake*, 5 Taunt. 519; *Thomson* v. *Wilson*, 2 Stark. 379; *Johnstone* v. *Hudlestone*, 4 Barn. & Cress. 922; *S. C.* 7 Dowl. & Ryl. 411. So that though such an interest may be created without writing, it cannot be surrendered in the same manner, except by operation of law, nor can it be assigned without writing. *Botting* v. *Martin*, 1 Camp. 317.

Must be by writing.

Cancellation of lease no surrender.

It is clear, that the cancellation of a lease does not operate as a surrender of it, *Roe* d. Earl of *Berkeley* v. Archbishop of *York*, 6 East, 86, unless the lessee accept a new lease; for the acceptance of a new lease, which is inconsistent with the former, whatever be its duration, and though the old lease be by deed, and the new lease by parol, (see Dyer, 140 b, 2 Stark. 410), is a surrender by operation of law, "because the lessee has, by acceptance thereof, affirmed the lessor to have ability to make the new lease, which he had not, if the first lease shall stand." *Ive's case*, 5 Rep. 11 b; *S. C. nom. Ives* v. *Sams*, Cro. El. 521; *Hutchins* v. *Martin*, Ib. 605; *Gybson* v. *Searle*, Cro. Jac. 84, 176; *Whitley* v. *Gough*, Dyer, 140 b; *Thomson* v. *Trafford*, Poph. 8. And it is immaterial that the second lease is not to commence until a future day. *Hutchins* v. *Martin*, Cro. El. 605. But if the new lease be void, it will not operate as a surrender. *Lloyde* v. *Gregory*, Sir W. Jones, 405; *Davison* d. *Bromley* v. *Stanley*, Burr. 2210; *Doe* d. Earl of *Berkley* v. Archbishop of *York*, 6 East, 86. In the last case, a distinction was taken between leases void and voidable.

What a surrender by operation of law.

*What constitutes a surrender by operation of law has been a frequent subject of litigation, as well in regard to tenancies from year to year, as demises for terms of years.

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Parol licence to quit does not determine tenancy.

It is clear, that a mere parol licence to quit, given by the landlord, and a quitting by the tenant accordingly, is not a determination of a tenancy from year to year, and the landlord may maintain an action for use and occupation, for rent accruing subsequently to the tenant's dereliction of the premises.

Thus, where, in consequence of some disputes which arose between the tenant and his landlord, the latter, upon the tenant threatening to quit the premises, said, "you may quit when you please," and the tenant accordingly left a few days afterwards, tendering the landlord rent for a day beyond the time he had occupied; Lord *Ellenborough* (in an action for use and occupation by the landlord) was of opinion that the tenancy was not determined. There was, he observed, no deed or note in writing, and nothing which could be considered a surrender by operation of law. *Mollett* v. *Brayne*, 2 Camp. 103. So, where the parties, having had a quarrel, went before a magistrate, upon whose recommendation they came to a mutual resolution to put an end to the tenancy, the landlord agreeing to receive rent for the proportion which was then elapsed of the current quarter; the tenant quitted, and tendered the rent and the key, which the

Nor mutual agreement to determine tenancy.

landlord refused to receive; and he afterwards brought an action for use and occupation, and, upon the authority of the last case, obtained a verdict. *Thomson* v. *Wilson*, 2 Stark. 379.

WHAT AMOUNTS TO A SURRENDER OF TENANCY FROM YEAR TO YEAR.

Nor acceptance of an irregular notice to quit.

Again, where a tenant from year to year, whose holding commenced at Lady-day, gave notice at Christmas to his landlord that he would quit at the Lady-day following, and the landlord agreed to accept such notice, it was held that this was no determination of the tenancy, there not being a half year's notice, or a surrender either in writing or by operation of law. Mr. Justice *Bayley* observed, that the question whether the landlord's assent to the notice operated as an actual surrender was not raised, inasmuch as that assent was not expressed in writing. *Johnstone* v. *Hudlestone*, 4 Barn. & Cres. 922; *S. C.* 7 D. & R. 411.

Substitution of another tenant dissolves a tenancy.

But if the landlord accept another person as tenant in the room of the quitting tenant, it should seem that the tenancy is determined by operation of law, and the tenant is discharged. And, therefore, where A. let premises to B. as tenant from year to year, who under-let to C., and A. gave notice to C. not to pay the rent to B. but to A.; and A. agreed to take C.'s bill for the rent, saying he would not have anything more to do with B.; the Court held that this constituted a surrender by "operation of law," A. having accepted C. as his tenant, and B.'s assent was to be presumed, being for his benefit; and, therefore, that an action for use and occupation could not subsequently be maintained by A. against B. *Thomas* v. *Cooke*, 2 Barn. & Ald. 119; *S. C.* 2 Stark. N. P. 408; see also **Stone* v. *Whiting*, 2 Stark. 235. And where a person is let into possession under an agreement that he is to stand in the place of the former tenant, it is not competent to him, in an action by the landlord for use and occupation, to allege the existence of the former tenancy. *Phipps* v. *Sculthorpe*, 1 Barn. & Ald. 51.

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What acts of the landlord discharge a tenant.

It may not be amiss to observe, in this place, that, if a tenant quit apartments without giving notice, the landlord may recover the rent, though he has put a bill up at the window for the purpose of letting the apartments; *Redpath* v. *Roberts*, 3 Esp. 225; or lighted and used fires in the rooms. *Griffith* v. *Hodges*, 1 Carr. & Payne, 419. But if the landlord lets them to another tenant, he has rescinded the contract, and cannot recover rent for any subsequent portion of the period included in the original tenancy, during which they remained unoccupied and unproductive. *Walls* v. *Atcheson*, 3 Bing. 462; *S. C.* 2 C. & P. 268.

HOUSE AND WORKSHOPS, WITH USUAL CLAUSES.

LEASE *of a* HOUSE *and* WORKSHOPS *in London, with an Inventory of the* FIXTURES, USUAL COVENANTS, *and a special Agreement in case of* DESTRUCTION *by* FIRE (*a*).

THIS INDENTURE, made the —— day of ——, 18—,
Parties. BETWEEN [*lessor*], of &c., of the one part; and [*lessee*],
Testatum. of &c., of the other part: WITNESSETH, that as well in
[*419] *consideration of the sum of £——, [of lawful money of
In consideration of £——, and of rent, and covenants. Great Britain], to the said [*lessor*] in hand paid by the said [*lessee*], at or before the sealing and delivery hereof, the receipt whereof is hereby acknowledged; *As also*, in consideration of the rent and covenants hereinafter reserved and contained, on the part of the said [*lessee*], his executors, administrators, and assigns, to be paid and performed,
Lessor leases. *He* the said [*lessor*] [*hath* demised and leased, *And* by these presents] *Doth* demise and lease unto the said [*lessee*], his executors, administrators) and assigns,
Parcels. ALL THAT messuage or tenement, with the workshops behind the same, situate No. ——, in —— Street, in the parish of ——, in the county of Middlesex, aforesaid, now
General words. in the occupation of the said [*lessee*]: *Together* with all [ways, passages, rights, easements, water-courses, profits,

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(*a*) As leases are executed for temporary purposes only, and they often comprise property of very small value, it seems to be particularly desirable that they should be prepared with the least possible expense, and, therefore, with as much brevity as is consistent with an explicit declaration of the intention of the parties; especially as a counterpart is frequently required, by which the expense resulting from unnecessary additions to the instrument is nearly doubled. Some of the forms in use are certainly objectionable, on account of their extreme prolixity. The next precedent furnishes an instance of a very concise form. The present is also, though not equally, short, and may be still farther abbreviated by the omission of the words within brackets.

commodities, privileges, and] appurtenances whatsoever to the said premises belonging, [or in anywise appertaining, or therewith usually held, occupied, and enjoyed]; To HAVE AND TO HOLD the said [messuage or tenement, workshops, and] premises hereby demised, [with their and every of their appurtenances], unto the said [*lessee*], his executors, administrators, and assigns, from the twenty-fifth day of December now last past, for [and during and unto] the [full end and] term of twenty-seven years thence next ensuing, and fully to be complete and ended; YIELDING AND PAYING, therefore, yearly, during the said term, [unto the said [*lessor*], his (*a*) executors, administrators, and assigns,] the clear rent or sum of £——, [of lawful money of Great Britain] on [the four most usual days of payment of rent in the year, that is to say,] the twenty-fifth day of March, the twenty-fourth day of June, the twenty-ninth *day of September, and the twenty-fifth day of December, in every year, by equal portions, free and clear of and from all Parliamentary or parochial taxes, rates, and assessments whatsoever; the first payment thereof to be made on the twenty-fifth day of March now next ensuing the date hereof; but subject nevertheless to the proviso and agreement hereinafter contained for the total or partial suspension of the said rent, in case of the destruction of the said demised premises, or any part thereof, by fire or otherwise. AND THE SAID [*lessee*], for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said [*lessor*], his (*a*) executors, administrators, and assigns, that he the said [*lessee*], his executors, administrators, or assigns, will pay, or cause to be paid, unto the said [*lessor*], his (*a*) executors, administrators, or assigns, the yearly rent of £—— hereinbefore reserved, on the days and in manner hereinbefore mentioned: AND ALSO will pay or cause to be paid, during the continuance

HOUSE AND WORKSHOPS, WITH USUAL CLAUSES.

Habendum.

For twenty-seven years.

Reddendum quarterly.

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Covenant by lessee to pay rent:

to pay sewers' rate, and all taxes and rates whatsoever:

(*a*) If the lessor has the fee, say—

FEE IN LESSOR.

"his heirs and assigns."

The most certain mode, however, of preventing the mistake of limiting the rent to the wrong class of representatives, is to reserve it generally, *i. e.* omitting the words within the brackets containing the reference to this note.

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of this demise, the sewers' rate, and all other taxes, rates, charges, and assessments whatsoever, Parliamentary, parochial, or otherwise, which now are, or hereafter shall be imposed, charged, or assessed upon, or in respect of, the said [messuage or tenement, workshops, and] premises, or any part thereof, or on the rent thereof: AND ALSO will, during the term hereby granted, at his or their own costs and charges, well and sufficiently repair, uphold, support, amend, and keep the said messuage or tenement, workshops, and premises, with the appurtenances, and every part thereof, in, by, and with all manner of necessary reparations and amendments whatsoever, when, where, and as often as the same shall be requisite during the said term: AND the said messuage or tenement, workshops, and premises, being so well and sufficiently repaired, amended, and kept, at the expiration or determination of the said term hereby granted, will peaceably and quietly [leave, surrender, and] yield up, unto the said [*lessor*], his (*b*) executors, administrators, or assigns, *with all and singular the fixtures and articles contained in the inventory hereunder written, in as good condition as the same now are, reasonable use and wear thereof, and damage by fire or tempest in the meantime only excepted (*c*). AND *further*,

To repair.

And at the end of term to leave same repaired, damage by fire excepted.

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Agreement that

(*b*) If the lessor has the fee, say—

"his heirs and assigns."

Case of fire should be excepted in covenants to repair and to pay rent.

(*c*) Without an exception to this effect in the covenant to repair, a lessee will be liable, under the covenant, to rebuild, in case of the destruction of the premises by fire; *Poole* v. *Archer*, Skin. 210; Earl of *Chesterfield* v. Duke of *Bolton*, Com. Rep. 627; *Bullock* v. *Dommitt*, 6 D. & E. 650; *Pym* v. *Blackburn*, 3 Ves. 34; or other inevitable accident; *Brecon Company* v. *Pritchard*, 6 D. & E. 750; though, in the absence of express stipulation, he is protected by the stat. 6 Ann. c. 31, s. 67, (made perpetual by stat. 10 Ann. c. 14), which provides, that no action shall be maintained "against any person, in whose house or chamber any fire shall accidentally begin;" but the statute was expressly declared not to make void any agreement "between landlord and tenant." See also Building Act, 14 Geo. 3, c. 78, ss. 86, 101.

Lessee's liability to rebuild under his covenant to repair.

And where a lessee covenanted to repair, and to insure for a limited sum, it was held that his liability under the former covenant was not restricted to the sum to be insured by virtue of the latter. *Digby* v. *At-*

that it shall be lawful for the said *[*lessor*], his (*d*) executors, administrators, or assigns, with workmen or others, once in every year, during the said term, at reasonable and

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lessor may enter to view the state thereof, and if necessary to give notice to repair.

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kinson, 1 Camp. 275. And the circumstance of the lessor having himself insured the property, and received the value of the damage from the insurance office, gives the lessee no equity to have the money laid out in reinstating the buildings covenanted to be repaired by him (the lessee). *Leeds* v. *Cheetham*, 1 Sim. 146.

As to lessor's obligation to rebuild.

Where there is a covenant to repair on the part of the lessor, he is, of course, bound to rebuild, but not otherwise; *Pindar* v. *Ainsley*, cit. 1 D. & E. 312; though the houses were insured, and he has received their value from an insurance office. *Belfour* v. *Weston*, 1 D. & E. 312; *Leeds* v. *Cheetham*, 1 Sim. 151.

Where the lessor has covenanted to repair the outside, and the lessee the inside, the remedy of the parties against each other is by cross actions of covenant; see 1 Sim. 151; though it is conceived that the lessor could not recover damages for the lessee's breach of covenant as to the inside, if the main walls, &c. of the buildings remained unbuilt by him.

Lessee's liability to rent in case of fire.

And even though the lessee is exonerated, by the exception introduced into the covenant to repair, from liability to rebuild, he will still be bound to pay rent under his covenant, unless it be qualified in this respect. *Monk* v. *Cooper*, 2 Stra. 763; see also *Weigall* v. *Waters*, 6 D. & E. 488, 1 D. & E. 312. And where the premises were destroyed by fire during a tenancy from year to year, the landlord was held to be entitled to recover the rent in an action for use and occupation. *Baker* v. *Holtzapffel*, 4 Taunt. 45. The tenant in such a case, in order to relieve himself from the untenantable property, should give the regular notice to quit. And it is now settled, that the Court of Chancery will not grant an injunction to prevent the lessor from bringing an action of law on the covenant; *Hare* v. *Groves*, Anstr. 687; *Holtzapffel* v. *Baker*, 18 Ves. 115, (overruling *Brown* v. *Quelter*, Amb. 619; *Camden* v. *Morton*, cit. 18 Ves. 118; *Steele* v. *Wright*, cit. 1 D. & E. 708); Lord *Eldon*, in the last case, observing, that "if it can be maintained that the meaning of the contract is, that, if a fire should happen, the rent shall not be paid, there is no occasion to come into equity; *but if that is not the effect of the contract at law, I cannot see any equity.*" And the circumstance of the lessor being under an obligation to repair the outside, which he has not performed, and of his having received the value of the property from an insurance office, form no ground for equitable relief against the legal consequence of the lessee's express contract to pay. *Leeds* v. *Cheetham*, 1 Sim. 146.

No relief in Equity.

(*d*) If the lessor has the fee, say—

"his heirs or assigns."

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convenient times in the day-time, to enter into and upon the said messuage or tenement, workshops, and premises, or any part thereof, to view and examine the condition thereof; and, if found necessary upon such view and examination, to give to the said [*lessee*], his executors, administrators, or assigns, or leave, at or upon the premises, for him or them, notice in writing, to repair and amend the same, within six calendar months then next following; within which said period of six calendar months he, the said [*lessee*], his executors, administrators, and assigns will repair, amend, and make good all such repairs and amendments as shall be mentioned in such notice, according to the true intent and meaning of these presents. AND THE SAID [*lessor*], for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said [*lessee*], his executors, administrators, and assigns, that he and they paying the said rent of £——, in manner aforesaid, and performing all and singular the covenants [provisoes and *agreements] on his and their part to be performed, as aforesaid, shall and may, peaceably and quietly, [have], hold, [use, occupy, possess], and enjoy the said [messuage or tenement, workshops, and] premises, with the appurtenances, for and during the said term hereby granted, without any [let, suit, trouble, molestation], interruption, or disturbance of or by the said [*lessor*], his (*e*) executors, administrators, or assigns, or any other person or persons whomsoever, claiming or to claim by, from, or under him, them, or any or either of them. PROVIDED ALWAYS, that if the said yearly rent hereby reserved, or any part thereof, shall remain unpaid for twenty-one days next after any of the said days, whereon the same ought to be paid as aforesaid, being first lawfully demanded upon or at any time after the said twenty-one days, and not paid when demanded (*f*): *Or*, if any or either of the other covenants

Covenant by lessee to repair accordingly.

Covenant by lessor for peaceable enjoyment.

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Power of re-entry, if rent shall be unpaid for twenty-one days, being first demanded at any time; or on breach of any of the covenants.

(*e*) If the lessor has the fee, say—

"his heirs or assigns."

Necessity of words dispensing with a demand of pay-

(*f*) It is proper to provide that the demand may be made at any time after the day of payment appointed by the condition; because, except in cases which fall under stat. 4 Geo. 2, c. 28, s. 2, (which only applies where

and agreements herein contained on the lessee's part, shall

HOUSE AND WORKSHOPS, WITH USUAL CLAUSES.

a half year's rent is due, and there is no sufficient distress), the lessor is not entitled to enter under a condition for re-entry on non-payment of rent, without a formal demand, which must be made with great precision, before sunset on the day specified in the condition. 1 Wms.'s Saund. 287, n.; *Maund's case*, 7 Rep. 28; *Clun's case*, 10 Rep. 129; *Kidwelly* v. *Brand*, Plow. 70; *Smith* v. *Bastard*, 1 Leon. 141; *Fabian* v. *Winston*, Cro. Eliz. 209; *Wood* v. *Chiver*, 4 Leon. 179; *Duppa* v. *Mayo*, 1 Saund. 287; *Doe* d. *Forster* v. *Wandlas*, 7 D. & E. 117. But it is clear that the parties may, by agreement, dispense with the necessity of such a demand of payment. *Dormer's case*, 5 Rep. 40; *Goodright* d. *Hare* v. *Cator*, Dougl. 477. And the words "although no formal or legal demand shall be made for payment" of the rent, (which are frequently inserted in leases), have been held to render it unnecessary to make *any* demand whatever, previously to bringing an ejectment. *Doe* d. *Harris* v. *Masters*, 2 Barn. & Cress. 490; *S. C.* 4 D. & R. 44.

ment at common law.

When the rent is not paid on the day it becomes due, tender to the lessor, at any time and place before the day allowed by the condition, will be sufficient. *Cropp* v. *Hambleton*, Cro. El. 48.

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Where the proviso for re-entry requires simply that the rent should be "lawfully demanded," the better opinion seems to be, that the demand must be according to the strictness of the common law; (see 3 Bligh, 338); and such words, therefore, should never be introduced, but with the qualification contained in the above precedent. The expression, however, does not exclude the operation of the statute; and, therefore, if a half-year's rent is due, and there is no sufficient distress, the lessor may enter notwithstanding these words, assuming of course that the case does not fall within the terms of the proviso. *Doe* d. *Scholefield* v. *Alexander*, 2 M. & S. 525. This case has been referred to by the several writers on the subject of landlord and tenant, as if it decided that no demand was necessary, even in the event expressed in the condition; and Lord *Ellenborough* is represented to have dissented from this proposition. Woodf. *Land. & Ten.* 267; Com. *Land. & Ten.* 442; Chamb. *Land. & Ten.* 733. But the question simply was, whether the statute was not altogether excluded by such a stipulation; and it was not denied, that, if the entry had been attempted to be supported on the terms of the proviso, and not by virtue of the statutory provision, *some* demand was necessary. The points upon which Lord *Ellenborough* differed from his learned brothers were, that *they* thought the case came within the statute, and *he* that it did not. The learned Judges also were of opinion, that the proviso required a demand according to the common law, and that the case was therefore within the mischief intended to be removed by the Legislature; while his Lordship, on the other hand, considered any demand to be sufficient with-

Words "lawfully demanded" how construed.

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not be by him, his (*g*) executors, administrators, and as-*signs, well and truly observed, performed, and kept, according to the true intent and meaning of these presents, *Then*, and thenceforth, it shall be lawful for the said [*lessor*], his (*h*) executors, administrators, or assigns, or any of them, into and upon the said [messuage or tenement, workshops, and] premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, re-possess, and enjoy, as if this indenture had never been made or executed, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. PROVIDED ALSO, *and it is further declared and agreed by and between the said parties*, that in case the said messuage or tenement, workshops, and premises, or any part thereof, shall be destroyed by fire or tempest during the said term hereby granted, then, and in such case, and so often as the same shall happen, the rent hereinbefore reserved, or a fair and just proportion thereof, according to the nature of the injury sustained, shall cease and be suspended, during so long as the said premises, or any part thereof, shall re-

Suspension of rent in case premises are destroyed by fire.

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in the terms of the proviso; but as the majority of the Court were of opinion that the entry was warranted by the statute, the question on the construction of the condition, as before observed, did not arise. The same point, namely, that the words in question do not exclude the operation of the statute, was subsequently decided in *Doe* d. Earl of *Shrewsbury* v. *Wilson*, 5 Barn. & Ald. 384.

(*g*) As the covenant to pay rent forms one of the covenants, and the right of re-entry has been already expressly extended to the case of its non-payment for a certain number of days, the ordinary language of this clause, which embraces *all* the covenants, is not quite correct. Under the general power of re-entry on breach of covenant, a right of entry would have accrued, in the event of the rent not being paid on the day it became due; and therefore, the express reservation of such right, in case of non-payment after a certain number of days, qualifies the lessor's right of entry under the general clause, in regard to the payment of rent. This was expressly laid down by several of the Judges, in the important case of *Smith* v. Earl *Jersey*, 3 Bligh, 464, 478, and indeed was assumed throughout the whole discussion of the case. As to the relief against forfeiture for non-payment of rent, *vide ante*, p. 361.

(*h*) If the lessor has the fee, say—
" his heirs or assigns."

main uninhabitable or unfit for use, by reason of such destruction: And if any dispute shall arise between the said parties, in regard to the amount of the abatement to be so made in the said rent, or the period for which the said rent, or any part thereof, shall be suspended, the same shall be referred to the arbitrament of two indifferent persons, one to be named by each of the said parties, with power to choose an umpire; and if either of the said parties shall neglect to name an arbitrator on his part, after fourteen days' notice in writing from the other of the said parties, requiring him so to do, then the said dispute shall stand referred to the person who shall have been named by the party giving such notice; and, in either of the said cases, the determination of the said arbitrators or abitrator shall be final and conclusive on both the said parties, in regard to the matters aforesaid, and their respective executors and administrators; and the award of the said arbitrators or arbitrator shall or may be made a *rule of his Majesty's Court of King's Bench at Westminster (*i*). In witness whereof the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

HOUSE AND WORKSHOPS, WITH USUAL CLAUSES.

[*426]

Testimonium.

THE INVENTORY to which the above-written indenture refers—

Inventory.

Front garret.—A partition, a closet with two shelves, a stove, a leaden sink and pipes, two locks and two keys.

(*i*) Though a simple exception in the *reddendum* or covenant to pay rent, as to the time during which the premises shall be rendered uninhabitable by fire is frequently inserted, and is sufficient to exonerate the lessee; yet, as an indefinite provision of this nature is very likely to produce disputes, particularly with respect to the amount of the abatement to be made in the case of a partial destruction, it seems to be desirable to provide some mode, such as the present, for the settlement of any question that may arise. If the lessee were the person to rebuild, (which is generally the case where there is a covenant on his part to insure), disputes may also arise as to the time to be allowed him for the rebuilding, since the lessor ought not to be damnified, (as he would be by the suspension of the rent), in consequence of any tardiness on the part of the lessee; but it frequently happens, that in such case the rent is not suspended, and then it is the interest of the lessee to repair the injury as

As to providing for the event of fire.

HOUSE AND WORKSHOPS, WITH USUAL CLAUSES.

Second floor.—One closet with three shelves in front room, two locks and keys in front, and one in the back room, a Portland stone chimney-piece and slab in each room. *First floor, front room.*—Two closets with four shelves in each, a marble chimney-piece and slab, two glass shades over the same, two locks and keys, a Bath stove. *Back room.*—Marble chimney-piece and slab, a Bath stove, one lock and key. *Shop and Parlour.*—Five closets with three shelves in each, two marble chimney-pieces and slabs, one Bath stove, three locks and keys. *Front area.*—A leaden cistern with ball-cock, a meat safe. *Front kitchen.*—A dresser with three drawers, Portland stone chimney-piece, a grate with two trivets. *Back kitchen*, &c.

[427]

UNFINISHED HOUSE, PART OF A LARGER ESTATE.

LEASE *of an Unfinished* HOUSE *near* LONDON, *with common Clauses.—Covenants to* FINISH *the* HOUSE—*to contribute towards* REPAIRING PARTY-WALLS, *cleansing* DRAINS, *&c.—to leave* FIXTURES—*to* INSURE—*to give Notice of any* ASSIGNMENT—*not to* ASSIGN *after a certain Period—not to use Premises as a* SHOP—*By the* LESSOR *to* PRODUCE *the Original* LEASE, *&c.*(*a*).

Parties. *Testatum.*

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part: WITNESSETH, that, in considera-

speedily as possible. Where this is intended, there should be an express declaration that the rent shall be payable notwithstanding the suspension of enjoyment, *ut post*, to prevent the possibility of dispute.

(*a*) The general stile of this lease is recommended to the reader's attention and adoption. It combines great conciseness with perspicuity, and a sufficient adherence to technical language with as little quaintness as possible. The form was used on the occasion of leases being granted of houses forming a new street in the west part of London.

tion of the rent and covenants hereinafter reserved and contained on the part of the said [*lessee*], his executors, administrators, and assigns, He the said [*lessor*] *Doth* demise and lease unto the said [*lessee*], ALL THAT parcel of ground, situate on the south side of —— street, in the parish of ——, in the county of Middlesex, together with the messuage or tenement erected thereon, being the fourth house westward from ——, exclusive of the corner house, which said premises, with the dimensions and abuttals thereof, are particularly described in the ground plot thereof, drawn in the margin hereof; *Together* with all cellars, vaults, areas, yards, lights, ways, water-courses, profits, advantages, and appurtenances to the said premises belonging, (except and reserved unto the said [*lessor*], *his executors, administrators, and assigns, the free running of water and soil, coming from any other buildings and lands contiguous to the said premises, in and through the water-courses made, or to be made, upon or under the said premises); TO HAVE AND TO HOLD the said premises hereby demised (*b*) unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of —— last, for the term of —— years, thence next ensuing: YIELDING AND PAYING therefore yearly, during the said term, unto the said [*lessor*], his executors, administrators, or assigns, the rent of £——, by equal quarterly payments, on the 24th day of June, the 29th day of September, the 24th day of December, and the 25th day of March in every year, without any deduction whatsoever in respect of the land-tax, sewer-rate, or any taxes, charges, or assessments whatsoever. AND *the* said [*lessee*] for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with the said [*lessor*], his executors, administrators, and assigns, that he the said [*lessee*], his executors, administrators, and assigns, will, during the said term, pay unto the said [*lessor*], his executors, administrators, and assigns, the rent hereby re-

UNFINISHED HOUSE, PART OF A LARGER ESTATE.

Parcels.

General words.

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Habendum.

Reddendum.

Covenant by lessee to pay rent.

(*b*) The words "except as aforesaid," which occurred here, have been expunged, because, as the excepted subject forms no part of the demised premises, they are inaccurate.

UNFINISHED HOUSE, PART OF A LARGER ESTATE.

served in manner hereinbefore mentioned, without any deduction whatsoever; *And also* will pay the land-tax, sewer-tax, paving rate, and composition for paving, and all other taxes, rates, duties, and assessments whatsoever, Parliamentary, parochial, or otherwise, now charged, or hereafter to be charged, upon the said premises, or upon the said [*lessor*], his executors, administrators, or assigns, on account thereof; *And also* that he the said [*lessee*], his executors, administrators, or assigns, will, at his or their own expense, before the 24th day of June next, finish and make fit for habitation the said messuage or tenement, with the appurtenances, to the approbation of the said [*lessor*], his executors, administrators, or assigns, or his or their surveyor, and also well pave a foot-*way in front of the said messuage or dwelling-house, with Yorkshire stone, four feet wide, with a stone kirb; *And also* will, during the said term, contribute a reasonable proportion towards the expense of making, repairing, and cleansing all party and fence walls, sewers, drains, watercourses, ways, paths, and other easements, used or to be used in common, by the occupiers of the said demised premises, and the occupiers of the adjoining or contiguous premises belonging to the lessor; *And also* will, as occasion shall require, during the said term, well and sufficiently repair, maintain, pave, empty, cleanse, amend, and keep the said demised premises, with the appurtenances, in such good and substantial repair as is necessary for the occupation of a tenant at rack rent; and the said demised premises, being in all things repaired, maintained, paved, emptied, amended, and kept as aforesaid, at the end or other sooner determination of the said term, will quietly yield up unto the said [*lessor*], his executors, administrators, or assigns, together with all chimney-pieces, windows, doors, fastenings, water closets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks, and keys, and all other things, which, at any time during the last seven years of the said term, shall be fastened to the said demised premises, and come within the denomination of fixtures (*c*); *And also* that it shall be

To pay taxes.

To finish house to the approbation of lessor's surveyor.

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To contribute towards party walls.

To repair;

and leave repaired, together with all fixtures, &c.

What are fixtures.

(*c*) The question, what are fixtures, or in other words, what things are,

lawful for the said [*lessor*], his executors, administrators, or assigns, and the original landlord of the said demised —That lessor may enter to inspect repairs.

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as between the parties, irremoveably annexed to the freehold, principally arises between three classes of persons.

1*st*, The real and personal representatives of the last owner.

2*nd*, The personal representatives of the tenant for life, and the reversioner or remainder-man.

3*dly*, (Which is the point most relevant to the present discussion), between the landlord and tenant.

General rule.

The general rule is, that what a lessee has annexed to the inheritance he cannot remove; and the act of removal is waste: *Cooke* v. *Humphrey*, Moore, 177; Lord *Darcy* v. *Askwith*, Hob. 234: but the rule has been much relaxed, in later times, in favour of the tenant, and "he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscots fixed only by screws, and the like." *Per* Lord *Ellenborough*, 3 East, 53; and see *Beck* v. *Rebow*, 1 P. W. 94; *Ex parte Quincy*, 1 Atk. 477; *Lawton* v. *Lawton*, 3 Atk. 13; *Lawton* v. *Salmon*, 1 H. Bl. 260, n. An exception too to the general rule exists in regard to buildings, utensils, &c., erected for the purposes of trade, which have long been held to be removeable. Thus, at a very early period, it was held that vats, furnaces, &c., used by brewers, dyers, soap-boilers, and such persons, though fixed in the ground or buildings, might be removed by the lessee *during the term*. Year Book, 20 Hen. 7, 13 a, & b; *Poole's case*, Salk. 368; and see 3 East, 52.

Rule has been modified in favour of the tenant.

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Rules as to fixtures relaxed in favour of trade.

Engine to work a colliery.

So, a fire engine to work a colliery, erected by a tenant for life, has been held to belong to his personal representatives, *Lawton* v. *Lawton*, 3 Atk. 13; Lord *Dudley* v. Lord *Ward*, Amb. 113, and would, therefore, *a fortiori*, be removeable by a lessee, who, it should be observed, is in general regarded with more indulgence than any other claimant. 1 H. Bl. 260, n.; 3 East, 51.

Varnish house.

So, a varnish house used by the lessee in his trade, and which had a brick foundation let into the ground, with a chimney belonging to it, has been held to be removeable: the wooden superstructure (the removal of which was the subject of dispute), had been brought by the lessee from another place. *Penton* v. *Robart*, 2 East, 88.

Exception in favour of trade not extended to agriculture.

But the exception in favour of trade has been held not to apply to buildings and fixtures erected for *agricultural* purposes. This doctrine was much discussed in the case of *Elwes* v. *Maw*, 3 East, 39, where the lessee of a farm had, at his own expense, erected a beast-house, carpenter's shop, fuel-house, pump-house, and fold-yard, the buildings being composed of bricks and mortar, and tiled, and the foundation about a foot and a half deep in the ground. The carpenter's shop was closed in: the other buildings were open to the front, and supported by brick pillars.

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premises, or his or their agents, at all seasonable times, during such last seven years, to enter the said demised

The fold-yard wall was of bricks and mortar, and its foundation was in the ground. The lessee, before the expiration of his lease, pulled down the erections, dug up the foundation, and carried away the materials, leaving the premises in the same state as when he entered; the lessor brought an action on the case in the nature of waste, and obtained a verdict, with 60*l.* damages, subject to the opinion of the Court; who, after much argument, held the action to be maintainable, the buildings in question not being for the purposes of trade. Lord *Ellenborough's* judgment, in this case, contains an able and elaborate examination of the leading authorities upon the subject.

Trees in a nursery ground.

It may be observed, in farther illustration of the distinction between trade and agriculture, that though it is clear that a person in the business of a gardener or nursery-man, may remove trees planted in the course of his trade; yet, in a late case, an opinion was expressed by Mr. Justice *Heath*, that a farmer had no right to remove young apple trees, which he had planted in a nursery, for the purpose of supplying the orchards. *Wyndham* v. *Way*, 4 Taunt. 316.

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Barns and sheds.

Barns and sheds erected by the tenant of a farm, are, as usually built, clearly not removeable; but in a case where a lessee had erected a barn upon pattens and blocks of timber, lying upon, but not fixed in, the ground, and it was usual in that part of the country so to erect barns in order to carry them away, (though the latter fact does not seem very material) they were held to be removeable. *Culling* v. *Tufnal*, Bull. N. P. 34; and see 3 East, 55; see also *Naylor* v. *Collinge*, 1 Taunt. 19. Lord *Kenyon*, indeed, on one occasion, held that a tenant was entitled to remove Dutch barns, though fixed in the ground; *Dean* v. *Allaley*, 3 Esp. N. P. 11; but his Lordship seems not to have distinguished between buildings for the purposes of trade, and for the purposes of agriculture; a distinction which, we have seen, has been since established by the case of *Elwes* v. *Maw*.

Cyder-mill.

In an early case, cit. 3 Atk. 13, 16, Lord C. B. *Comyn*, at Nisi Prius, held that a cyder-mill was not parcel of the inheritance, as between the executor and the heir: and Lord *Ellenboraugh* seems to have approved of this decision, considering it "as a mixed case between enjoying the profits of land and carrying on a species of trade," and as properly an accessary to the trade of making cyder. See 3 East, 54.

Lime-kilns.

The same kind of observation would apply to lime-kilns. In a late case, where the question as to a lime-kiln arose, it was not decided, the case being determined on another point. *Thresher* v. *East London Water-Works Company*, 2 Barn. & Cress. 608: *S. C.* 4 D. & R. 62.

Salt pans in salt works.

In *Lawton* v. *Salmon*, 1 Hen. Blackst. 259, n., Lord *Mansfield* held,

premises and take a schedule of the same fixtures and things; *And also* that the said [*lessee*], his executors, ad- UNFINISHED HOUSE, PART OF A LARGER ESTATE.

that certain vessels used in salt-works, called salt-pans, which were of iron, and were fixed with mortar to a brick floor, but were brought in pieces, and might be removed in pieces without injury to the buildings, belonged to the heir and not to the executor, on the ground that they were accessory to, and necessary to the enjoyment of, the inheritance, *i. e.* the salt spring; yet his Lordship thought, that, *if erected by a tenant to whom the springs had been let, they might have been removed.*

So, in *Buckland* v. *Butterfield*, 4 J. B. Moore, 440; *S. C.* 2 Brod. & Bing. 54, it was held, that a tenant from year to year could not remove a conservatory and pinery, which had been erected by him. The conservatory had a foundation of brick work, fifteen inches deep, on which was bedded a sill, consisting of wood and glass, the frame-work was placed on the sill; it was attached to the dwelling-house by cantilivers, which were let nine inches into the wall, and fastened thereto with wedges; over the conservatory was a balcony with iron rails, resting on those cantilivers, and which had a communication with the drawing-room on the first floor, through a folding door; two windows were also opened from the lower part of the house into the conservatory, one from the dining room, and the other from the library; and it was heated by a flue communicating with the chimney of the dining room. The pinery had been erected in the garden on a brick wall four feet high. Conservatory and pinery. [432]

It should be observed, that fixtures which the tenant has the power of removing, must be removed during the term, *Fitzherbert* v. *Shaw*, 1 Hen. Blackst. 258; and see *Poole's case*, Salk. 368; *Ex parte Quincy*, 1 Atk. 477; *Lee* v. *Risdon*, 7 Taunt. 191; *Lyde* v. *Russell*, 1 Barn. & Adolph. 394, or, at all events, during the possession; for, in *Penton* v. *Robart*, 2 East, 88, it was held that a lessee holding over after his term, and who was treated by the lessor as a trespasser, was at liberty to remove fixtures. This may seem to be at variance with the general position before cited, and which has often been laid down on the subject; but probably the learned Judges who have so stated it, had not the case of a tenant holding over after the expiration of his tenancy in their contemplation, and that they used the word "term," in the sense of occupation generally. Removeable fixtures must be removed during the term:

But the rule requiring that the removal should take place during the term or possession, only applies to such things as are parcel of the inheritance; and, therefore, where certain jibs were erected by the lessee of a warehouse, which were not fixed in the ground, but were placed in caps or steps of timber, and might be removed without injuring either the caps or the buildings, and were usually valued between outgoing and incoming tenants; it was held that these were personal chattels only, for which tro- but rule does not extend to chattels which are not fixtures.

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ministrators, and assigns, will, in every fourth year of the said term, paint all the outside wood-work and iron-work belonging to the said premises, with two coats of proper oil colours, in a workman-like manner; *And also* (*d*) will forth-

—To paint outside.

*with insure the buildings erected, and hereafter to be erected on the ground hereby demised, to the full value thereof, in the —— Fire Office, in ——, London, in the joint names of [*original landlord*], of &c., the original landlord of the said premises, his heirs or assigns, and the said [*lessee*], his executors, administrators, or assigns, and keep the same continually so insured during the said term, and will, upon the request of the said [*lessor*], his executors, administrators, or assigns, or his or their agent, shew the receipt for the premium paid for such insurance, for every current year; *And also* will, as often as the buildings already erected and to be erected on the ground hereby demised shall be burnt down or damaged by fire, forthwith reinstate the same under the direction of the surveyor of the said [*lessor*], his executors, administrators, or assigns: *And also* that it shall be lawful for the said [*lessor*], his executors, administrators, or assigns, and his or their agents, at all seasonable times during the said term, to enter the said demised premises, to take plans and examine the condition thereof; *And further*, that all wants of reparation which, upon such views, shall be found, and for the amendment of which notice in writing shall be left at the said premises, the said [*lessee*], his executors, administrators, or assigns, will, within three calendar months

—To insure from fire in the joint names of the original landlord and the lessee.

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—To rebuild in case of fire.

—To repair according to notice.

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ver might be maintained after the lessee had quitted the possession. *Davis* v. *Jones*, 2 B. & A. 165.

In the late case of *Lyde* v. *Russell*, 1 Barn. & Adolph. 394, a tenant brought trover for some bells put up by him, and which, after he quitted, the landlord had taken down, refusing to deliver them up unless the plaintiff would pay him a sum claimed for rent; it was held, that the tenant not having removed the bells during the term, could not maintain the action, and that the offer to deliver them up on payment of the money was no recognition of any such right.

(*d*) This covenant is evidently framed with a view to a similar covenant in the original lease, and should be made to correspond with that covenant.

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next after every such notice, well and sufficiently repair and make good accordingly; *And also* that the said [*lessee*], his executors, administrators, or assigns, will not cut, maim, alter, or injure any of the principal timbers, roofs, or walls of the buildings and premises hereby demised, nor convert, use, or occupy the said premises, or any part thereof, into or for any shop, warehouse, or other place for carrying on [the trade of a soap boiler, soap maker, tobacco-pipe maker or burner, smith, blacksmith, farrier, tanner, fellmonger, currier, leather dresser, dyer, scowerer, brewer, or sugar baker, or suffer the said premises to be used as or for a slaughter house, or a house for melting tallow, common brewhouse or distillery, or for a laystall, or for making or burning bricks, tiles, lime, or bones, or for] any [other] art, trade, or business (*e*), or otherwise *than as a private dwelling-house, without the consent in writing of the said [*lessor*], his executors, administrators, or assigns, nor by building or otherwise stop or obstruct any light belonging to any building on the ground adjoining or contiguous, or suffer to be done any thing which may tend to the annoyance or damage of the said [*lessor*], his executors, administrators, or assigns, or any of his or their tenants; *And also* that the said [*lessee*], his executors, administrators, or assigns, will not sell, assign, make over, or part with the said premises hereby demised, or any part thereof, for the said term hereby granted, without giving notice in writing within fourteen days then next to the said [*lessor*], his executors, administrators, or assigns, *And* will not, during the last seven years of the said term, sell, assign, demise, or make over, or part with the said premises, or any part

—Not to cut or alter walls, &c.

nor use premises as a shop.

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nor obstruct the light belonging to adjoining buildings.

—To give notice of assignment.

—Not to assign during the last seven years.

(*e*) If the restriction is intended to be general, there seems to be no necessity for specifying particular trades, in which case the words in brackets may be omitted; but a specification is of course necessary, where it is intended to exclude any occupation, which might not come under the denomination of a "trade" or "business." In the construction of covenants of this nature, it has been held that the occupation of a *schoolmaster* is a "trade or business;" *Doe* d. *Bish* v. *Keeling*, 1 Mau. & Selw. 95; and that a covenant not to carry on the business of a "*butcher*," was broken by selling meat, though no beasts were slaughtered. *Doe* d. *Gaskell* v. *Spry*, 1 Barn. & Ald. 617.

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—To refer disputes to original landlord.

thereof, for all or any part of the residue of the said term, without the consent in writing of the said [*lessor*], his executors, administrators, or assigns (*e*); *And that*, if, at any time hereafter, any dispute shall arise between the said [*lessee*], his executors, administrators, or assigns, and any other of the tenants of the said original landlord, his heirs, or assigns, touching the premises to them respectively demised, or the walls, lights, privileges, or appurtenances belonging thereto, or any annoyance arising therefrom, the said [*lessee*], his executors, administrators, or assigns, will from time to time refer every such dispute to be determined by the said [*original landlord*], his heirs, or assigns, and, in case of infancy, by the guardians of the infant, whose determination respectively the said [*lessee*], his executors, administrators and assigns, will abide by and perform. PROVIDED ALWAYS, and these presents are upon this condition, *that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid, (although no formal or legal demand shall have been made thereof (*f*),) or in case

Condition of re-entry on non-payment of rent, or breach of covenant.

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(*e*) As to these clauses, *vide ante*, p. 362.

Remedy under stat. 11 Geo. 2, to recover the vacant possession.

(*f*) As to the construction of these words, *vide ante*, p. 423. To give a right of re-entry upon non-payment for so short a period, without a demand, seems rather harsh; but as both law and equity afford relief against forfeiture in these cases, it is seldom that any proceedings are taken to recover possession for the mere non-payment of rent, unless the premises are deserted, and there is no sufficient distress. Under these circumstances, indeed, the stat. 11 Geo. 2, c. 19, provides a remedy, for it is enacted, sect. 16, "that if any tenant holding at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value, who shall be in arrear for one year's rent, shall desert the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall be lawful for two or more justices of the peace of the county, riding, division, or place, (having no interest in the demised premises), at the request of the lessor or landlord, or his, her, or their bailiff or receiver, to go upon and view the same, and to affix, or cause to be affixed, on the most notorious part of the premises, notice in writing, what day (at the distance of fourteen days at least) they will return to take a second view thereof; and if upon such second view the tenant, or some person upon his or her behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the pre-

of the breach or non-performance of any of the covenants and agreements herein contained on the part of the said [*lessee*], his executors, administrators, or assigns, then, and in any of such cases, it shall be lawful for the said [*lessor*], his executors, administrators, or assigns, at any time thereafter, into and upon the said demised premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy, as in his or their former estate, any thing hereinbefore contained to the contrary notwithstanding. And the said [*lessor*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with the said [*lessee*], his executors, administrators, and assigns, that he and they, paying the rent hereby

UNFINISHED HOUSE, PART OF A LARGER ESTATE.

Covenant by lessor for quiet enjoyment.

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mises, then the said justices may put the landlord or lessor into the possession of the said demised premises; and the lease thereof to such tenants, as to any demise therein contained only, shall from thenceforth become void." Sect. 17, declares that the proceedings of the justices shall be examinable in a summary way, by the next justice or justices of assize of the counties in which such lands or premises lie; and if they lie in London or Middlesex, by the Courts of King's Bench or Common Pleas; and if in the counties palatine of Chester, Lancaster, or Durham, then before the judges thereof; and if in Wales†, then before the Courts of Grand Sessions, respectively; who are empowered to order restitution to be made to such tenant, together with his or her expenses and costs, to be paid by the lessor or landlord, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs not exceeding 5*l.* for the frivolous appeal.

By statute 57 Geo. 3, c. 52, the provisions of this statute are extended to tenants, who shall be in arrear one *half* year's rent, and who shall hold under any demise or agreement, whether written or verbal, and although no right of re-entry be given in case of non-payment of rent.

Extended by stat. 57 Geo. 3, c. 52.

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It was held in a late case, that where a tenant ceased to reside on the premises for several months, and left them without any property to satisfy the year's rent, the landlord might properly proceed under the stat. 11 Geo. 2, c. 19, s. 16, to recover the premises, although he knew where the tenant then was, and although the justices found a servant upon the premises, when they first went to view them; the Court considering that this person was placed there to maintain a colourable possession. *Ex parte Pilton*, 1 Barn. & Ald. 369.

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† The jurisdiction of the Courts of Great Sessions is abolished by the 1 Wm. 4, c. 70.

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reserved, and performing the covenants hereinbefore on his and their parts contained, shall and may peaceably possess and enjoy the said demised premises, for the term hereby granted, without any interruption from the said [*lessor*], his executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him, them, or any of them: AND FURTHER, that he the said [*lessor*], his executors, administrators, and assigns, will, during the said term, (if not prevented by fire or other inevitable accident), at the request and costs of the said [*lessee*], his executors, administrators, or assigns, produce and shew, for the purpose of defending and proving his or their title to the said premises, an indenture of lease, dated the —— day of ——, whereby the said [*original landlord*] demised the said premises with others to one [J. S.], and also a deed-poll indorsed thereon, whereby the said [J. S.] assigned the said premises to the said [*lessor*]. IN WITNESS, &c.

And to produce original lease and assignment.

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OF PART OF HOUSE, DETERMINABLE ON NOTICE.

LEASE *of* PART OF A HOUSE, *being a Dining-room, Parlour, Kitchen, Bed-chambers, Garrets, Cellar, and Coal-place, for twenty-one Years.—Covenant by Lessee not to permit Offensive Trades to be carried on, or bring combustible Materials upon the Premises, so as to invalidate Fire Insurance.—By the Lessor to pay all Taxes, Payments for Water, &c., and also to indemnify the Lessee therefrom, and from serving Parish Offices.—Proviso for determining Lease at the end of seven or fourteen Years, on giving Six Months' Notice.*

THIS INDENTURE, made the —— day of ——, 18—; BETWEEN [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part, WITNESSETH, that, in consideration of the rent and covenants hereinafter reserved and

Parties.

Testatum.

OF PART OF HOUSE, DETERMINABLE ON NOTICE.

contained on the lessee's part to be paid, done, and performed; *He*, the said [*lessor*], [*Hath* demised, leased, and to farm letten, *And* by these presents] *Doth* demise, lease, and to farm let unto the said [*lessee*], his executors, administrators, and assigns, ALL THAT dining-room, &c. *(describe rooms)*, being part of a messuage &c., situate &c., *Together* with full and free liberty of passing and repassing at all times to and from the said dining-room, parlour, kitchen, bed-chambers, garrets, cellar, and coal place; AND all ways, passages, lights, easements, waters, watercourses, profits, commodities, advantages, and appurtenances whatsoever, to the said premises belonging or appertaining, or therewith held, used, occupied, or enjoyed. TO HAVE AND TO HOLD the said dining-room, &c., with the appurtenances, unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of —— instant, for, and during, *and unto the full end and term of twenty-one years thence next ensuing, and fully to be complete and ended, determinable nevertheless as hereinafter mentioned: YIELDING AND PAYING therefore, yearly and every year during the said term of twenty-one years hereby granted, the clear rent or sum of £——, of lawful money of Great Britain, on the four following usual days of payment, that is to say, the twenty-fifth day of March, the twenty-fourth day of June, the twenty-ninth day of September, and the twenty-fifth day of December in every year, by equal portions, the first payment thereof to be made on the twenty-fifth day of March now next. And the said [*lessee*], for himself, his heirs, executors, administrators, and assigns, Doth hereby covenant with the said [*lessor*], his heirs, and assigns, in manner following, that is to say, *(covenant by lessee to pay rent and make repairs, ut ante*, p. 420): AND ALSO, that he the said [*lessee*], his executors, administrators, or assigns, will not, during the continuance of this demise, use or follow, or permit to be used or followed, in or upon the said demised premises, or any part thereof, the business of a brazier, tallow chandler, oilman, smith, butcher, or any other business or employment, which is noisy, offensive, or occasions offensive smells; nor shall or will bring, or permit to be brought to or lodged in or upon the said demised premises, or any part thereof, hemp, flax, tallow, oil, pitch, tar, turpentine,

Lease.

Parcels; dining-room, parlour, &c.

General words.

Habendum for twenty-one years, determinable, &c.

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Reddendum by quarterly payments.

Covenant by lessee not to use or permit noisy or offensive trades;

Not to bring combustible materials on the premises, so as

OF PART OF HOUSE, DETERMINABLE ON NOTICE.

gunpowder, or any other goods of a sort or quality which may in any way affect or invalidate any insurance or insurances from fire, made, or hereafter to be made, by the said [*lessor*], his heirs, executors, administrators, or assigns, in, of, or upon the said dwelling-house, or in, of, or upon any goods and merchandizes in the part thereof by him occupied.

to invalidate any fire insurance.

Covenant by lessor for lessee's quiet enjoyment;

AND THE SAID [*lessor*], for himself, his heirs, executors, administrators, and assigns, Doth hereby covenant, promise, and agree with and to the said [*lessee*], his executors, administrators, and assigns, that he the said [*lessee*], his executors, administrators, or assigns, paying the rent or sum of £——, hereinbefore reserved and made payable, and observing, fulfilling, and keeping all and singular the covenants, articles, clauses, and agreements herein contained, which on his or their parts and behalfs are or ought to be observed,

[*439] *performed, fulfilled, and kept, according to the true intent and meaning of these presents, shall, and lawfully may, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said premises, with the appurtenances, hereby leased or demised, or mentioned, or intended so to be, for and during the said term of twenty-one years, without the let, suit, trouble, denial, disturbance, eviction, ejection, molestation, or interruption whatsoever, of or by the said [*lessor*], his executors, administrators, or assigns, or any other person claiming or to claim from, by, or under him, them, or any of them, or by or through his or their acts,

free from all taxes payments for water, &c.

means, or default; freed and discharged and acquitted of and from the payment of land-tax, and all other taxes, assessments, and payments for water, or otherwise whatsoever, and of what nature or kind soever, now payable or hereafter to become payable in respect of the said premises hereby demised, or any part thereof, by authority of

Covenant by lessor to pay all taxes, &c.

Parliament, or otherwise howsoever: AND which said taxes, assessments, and payments, the said [*lessor*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree, with and to the said [*lessee*], his executors, administrators, and assigns, to pay

And also to indemnify lessee therefrom, and from serving parish offices.

and satisfy: *And also* to indemnify the said [*lessee*], his executors, administrators, and assigns, of and from the payment of all and every or any sum or sums of money in respect thereof; and also of and from all costs, charges, expenses, claims, and demands, which he the said [*lessee*],

his executors, administrators, or assigns, shall bear, pay, or sustain, for or by reason or on account of his or their being liable, or being considered as liable, to serve parish offices. *(Proviso for re-entry, ut ante,* p. 423*)*, PROVIDED ALSO, *and it is hereby agreed* between the several parties to these presents, that if the said [*lessee*], his executors, administrators, or assigns, shall be desirous of putting an end to this present demise, at the expiration of the first seven years or fourteen years of the said term of twenty-one years hereby granted, and shall for that purpose deliver to the said [*lessor*], his executors, administrators, or assigns, or leave at his usual place or places of abode, six calendar months' previous notice in writing of such his or their desire, and shall pay or cause to be paid all arrears of rent, and perform all *and every the covenants hereinbefore contained, and on his and their part and behalf to be performed, then and in such case (*a*), immediately after the expiration of the said

OF PART OF HOUSE, DETERMINABLE ON NOTICE.

Proviso enabling the lessee to determine the lease, at the end of seven or fourteen years, on giving six months' notice.

[*440]

(*a*) If the power of determining the lease is to be mutual, add—

"Or if the said [*lessor*], his heirs, or assigns, shall be desirous of determining the said term hereby granted, at the end of the said seven or fourteen years, and of such his or their desire shall give unto the said [*lessee*], his executors, administrators, and assigns, such previous notice as is hereinbefore provided to be given by the said [*lessee*], his executors, administrators, or assigns, for such purpose, then, and in either of the said cases, immediately," &c.

Variation where lease is determinable by *either* party.

Where a lessee is authorized, in the terms of the clause in the text, to determine the lease on payment of the rent and performance of the covenants, this has been held to be a condition precedent to the power of determining the lease by notice. Thus, where in a lease for seven years, containing the usual covenants on the part of the lessee, to pay the rent, keep the premises in repair, &c., there was a proviso that if the lessee, his executors, &c. should be minded, at the end of the first three or five years of the term, to quit the premises, and should give six months' previous notice, then, and in such case, and from and after the expiration of the said three or five years, *and payment of all rents and duties on the tenant's part to be paid, and performance of the covenants contained on the part of the lessee, until the expiration of the said three or five years,* the indenture should cease and be utterly void; it was held, that the payment of rent and performance of the other covenants was a condition precedent to the lessee's determination of the term, at the end of the first three years, and that

Payment of rent, &c. necessary to enable lessee to determine lease by notice.

OF PART OF HOUSE, DETERMINABLE ON NOTICE.

term of seven or fourteen years, this present lease, and every thing herein contained, shall cease and be absolutely void, to all intents and purposes whatsoever.

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his merely giving six months' notice, expiring within the first three years, was not sufficient for that purpose. *Porter* v. *Shephard*, 6 D. & E. 665.

Construction where lease is to be for several alternative periods.

Where a lease, or an agreement for a lease, is granted for several alternative periods, as for seven, fourteen, *or* twenty-one years, (an ambiguity which often occurs in informally prepared agreements), it will be construed, as against the lessor, as a lease, or agreement to grant a lease, for the longest of the periods specified, determinable at the option of the lessee only, in conformity to the rule that grants are to be taken most strongly against the grantor. *Dann* v. *Spurrier*, 3 Bos. & Pull. 399; *S. C.* 7 Ves. 231; *Doe* d. *Webb* v. *Dixon*, 9 East, 15; see also *Price* v. *Dyer*, 17 Ves. 356.

Lease not determinable as to *part* only.

It has also been held, that these provisoes for determining leases by notice, do not authorize the determination of the lease, as to *part* only, though it contain several demises of distinct parts; *Roe* d. *Rodd* v. *Archer*, 14 East, 245; and, therefore, where it is intended that the lease shall be determinable as to part only, or shall be determinable as to the several parts at different periods, a special clause to this effect should be introduced; and unless distinct rents are reserved of such parts *ab initio*, a distinct reservation should be made in respect of each part on such event. (For clauses of this nature, *vide* next precedent, p. 442).

If the lessor has the inheritance in fee, the notice should be directed to be given by him, his *heirs or assigns;* or, if he has a power of appointment, by him, his *appointees*, heirs, or assigns; if he has a term only, by him, his executors, administrators, or assigns; while that of the lessee should, of course, proceed from him, his executors, administrators, or assigns. But as the intention in these cases obviously is, that the power of determining the lease on the part of the lessor shall accompany the reversion, and, on the part of the lessee, go with the lease; the Courts will not allow a mere slip, or inaccuracy of expression, in regard to the class of representatives from whom the notice is to proceed, to sever the right of giving it from the reversion or the lease; and, therefore, where in a lease from A., who was seised in fee, to B., his executors or administrators for twenty-one years, with a power to *either* party, his *executors, or administrators*, at the end of the first seven or fourteen years, on giving twelve months' notice to the other, his *heirs*, executors, or administrators, it was held, that this power, as to the lessor, was annexed to the reversion, and might be exercised by his devisee, as the person for the time being entitled to such reversion. *Roe* d. *Bamford* v. *Hayley*, 12 East, 464. Where there are several persons jointly interested in the reversion, a notice of determining the lease, which is required to be under the hand of the lessor, should be signed by *all*. *Right* d. *Fisher* v. *Cuthell*, 6 Esp. 149; *S. C.* 5 East, 496.

Inaccuracy of expression held not to sever power of determining lease from the reversion, &c.

As to notice by joint-tenants.

LEASE *of* MESSUAGE *and* WAREHOUSE *for fourteen Years,* DETERMINABLE *by* NOTICE, *as to the* MESSUAGE, *at the End of any Year of the Term, and as to the* WAREHOUSE, *at the End of seven Years, with Clauses of* Reddendum, *and* COVENANT *to* PAY *Rent, adapted to the case of such* PARTIAL DETERMINATION. LESSEE *to* REPAIR *the* INSIDE *and* LESSOR *the* OUTSIDE *of the demised Premises.*

DETERMINABLE BY NOTICE AS TO PART AT ONE PERIOD, AND AS TO OTHER PART AT ANOTHER PERIOD.

THIS INDENTURE, made &c., BETWEEN [*lessor*] of &c., of the one part; and [*lessee*], of &c., of the other part: WITNESSETH, that, in consideration of the yearly rent hereby reserved, and the covenants, conditions, and agreements hereinafter contained, on the part of the said [*lessee*], his executors, administrators, and assigns, to be respectively paid, observed, and performed, the said [*lessor*] *Hath* granted, demised, and leased, and by these presents *Doth* grant, demise, and lease unto the said [*lessee*], his executors, administrators, and assigns: *First,* ALL THAT messuage or dwelling-house, situate and being on the north side of and fronting to a certain street called ——, in the parish of ——, in the county of ——, and more particularly distinguished by No. ——. *Secondly,* All that brick building, now used as a warehouse, situate and being at the back of the same messuage or dwelling-house, with the way and passage leading to the same: Together with all and singular the cellars, areas, vaults, lights, ways, paths, passages, drains, pipes, water-courses, rights, privileges, advantages, and appurtenances whatsoever, to the same messuage and warehouse respectively belonging or in anywise appertaining: TO HAVE AND TO HOLD the said messuage or dwelling-house, warehouse, and other premises hereby demised or intended so to be, with the appurtenances, unto the said [*lessee*], his executors, administrators, and assigns, for the full term of fourteen years from the 25th

Parties.

Parcels.

General words.

Habendum.

DETERMINABLE BY NOTICE AS TO PART AT ONE PERIOD, AND AS TO OTHER PART AT ANOTHER PERIOD.

day of November now last past, (subject, nevertheless, to a proviso hereinafter contained for determining the said term by notice, at the end of the first or any succeeding year of the said term as to the said messuage or dwelling-house, and at the end of the first seven years of the said term as to the said warehouse), YIELDING AND PAYING therefore, yearly and every year, unto the said [*lessor*], his heirs and assigns, during the continuance of the said term hereby granted, as to the whole of the said demised premises, the yearly rent of 80*l.*, of lawful British money, to be paid in even portions half-yearly, on the —— day of ——, and the —— day of ——, in every year, clear of all deductions and abatements whatsoever, for taxes, or on any other account whatsoever, and the first of the said half-yearly payments to be made on the —— day of ——, now next ensuing. But in case the said term hereby granted shall be determined by notice, under or by virtue of the proviso for that purpose hereinafter contained, either as to the said messuage or dwelling-house, or the said warehouse only, YIELDING AND PAYING thenceforth, during the residue which shall be then unexpired of the said term hereby granted, if the said term shall be so determined as to the said messuage only, the yearly rent of 30*l.*, of lawful British money, for or in respect of the said warehouse; or if the said term shall be so determined as to the said warehouse only, then the yearly rent of 50*l.*, for or in respect of the said messuage or dwelling-house, with the appurtenances; the said yearly rent of 30*l.* or 50*l.*, as the case may be, to be paid in even portions half-yearly, on the days and in manner hereinbefore appointed for payment of the said yearly rent of 80*l.*, and the first of such half-yearly payments to be made on such of the said days as shall happen next after the said term shall be so determined by notice as aforesaid (*a*). And the said [*lessee*], for himself, his heirs, executors, administrators, and assigns, hereby covenants and agrees with the said [*lessor*], his heirs, and assigns, that the said [*lessee*], his executors, administrators, and assigns, will or shall,

Reddendum as to the entire premises.

Reddendum in case lease should be determined as to the warehouse or messuage only.

Covenant by lessee to pay rent;

(*a*) It would be prudent in such a case as this, to have a stamp on the lease in respect of *each* rent.

during the continuance of the said term hereby granted, as to the whole or part of the said demised premises, duly pay or cause to be paid, unto the said [*lessor*], his heirs, and assigns, such of the said yearly rents hereby reserved, as shall, for the time being, be payable, by virtue of the reservations hereinbefore contained, on the days or times, and in manner hereinbefore appointed for payment thereof, and according to the true intent and meaning of these presents; *And also*, that the said [*lessee*], his executors, administrators, and assigns, shall and will, at all times during the continuance of the said term hereby granted, well and sufficiently repair and keep repaired, in a workmanlike manner, and with good materials, at his or their own proper costs and charges, all and singular the glass and other windows, shutters, doors, locks, fastenings, partitions, ceilings, floors, chimney-pieces, shelves, pavements, privies, sinks, drains, cisterns, pipes, water-courses, and all other the inside of the said premises hereby demised; and also shall and will, at the end, or other sooner determination of the said term hereby granted, yield and deliver up the said messuage or dwelling-house and warehouse, or the part thereof in respect of which the said term hereby granted shall be determined as hereinafter mentioned, in good and tenantable repair, unto the said [*lessor*], his heirs, or assigns; *And also, (power of entry to examine repairs, ut ante*, p. 421). And the said [*lessor*], for himself, his heirs, executors, administrators, and assigns, hereby covenants and agrees with the said [*lessee*], his executors, administrators, and assigns, in manner following, (that is to say), that he the said [*lessor*], his heirs, or assigns, will and shall, at all times during the continuance of the term hereby granted, at his or their own costs and charges, well and sufficiently repair and keep repaired, the walls, roof, and outside of the said premises hereby demised; and also will and shall, once in every four years during the said term, paint in good and proper oil colour, the doors, window-frames, rails, and other the outside wood and iron work of the same premises(*a*). Provided always, and it

DETERMINABLE BY NOTICE AS TO PART AT ONE PERIOD, AND AS TO OTHER PART AT ANOTHER PERIOD.

—to repair the inside of the premises.

Covenant by lessor to repair outside.

Proviso for de-

(*a*) Sometimes a clause to this effect is added—

"And that if the said [*lessor*], his heirs, or assigns, shall ne- Lessee authoriz-

DETERMINABLE BY NOTICE AS TO PART AT ONE PERIOD, AND AS TO OTHER PART AT ANOTHER PERIOD.

is hereby declared and agreed, by and between the said parties hereto, that it shall be lawful for the said [*lessor*], his heirs or assigns, or for the said [*lessee*], his executors, administrators, or assigns (*b*), to determine and put an end to this present demise and the term hereby granted, in respect of the messuage or dwelling-house and premises firstly hereinbefore demised, at the end of the first or any succeeding year of the said term, upon delivering to the other of them, his executors, administrators, or assigns, *or his heirs or assigns, as the case may be*, six calendar months' previous notice in writing, or leaving the same at his or their usual place or places of abode; And also to determine and put an end to this present demise, and the term hereby granted in respect of the warehouse and premises secondly hereinbefore demised, at the end of the seventh year of the said term hereby granted, upon giving six calendar months' previous notice as aforesaid; And that in either of the said cases this present indenture, and every clause, matter, and thing herein contained, so far as respects that part of the said demised premises, in respect

termining lease as to the several parts of the premises at different periods.

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glect, after notice in writing from the said [*lessee*], his executors, administrators or assigns, to repair or paint the said premises hereby demised, or any part thereof, in pursuance of the covenant hereinbefore contained, then, so often as the same shall happen, it shall be lawful for the said [*lessee*], his executors, administrators, or assigns, to make the said repairs, or paint the part or parts of the said premises in respect of which such default shall be made, at his or their own costs and charges, and deduct and retain the sum or sums of money expended therein, out of the rent that may then be or shall thereafter become due, the said [*lessee*], his executors, administrators, or assigns, shewing and producing unto the said [*lessor*], his heirs or assigns, the vouchers or receipts for the said monies so expended by him or them as aforesaid."

ed to make repairs, &c., and deduct monies so expended out of the rent.

(*b*) If the premises are leasehold, the words may be—

" for either of the said parties, his respective executors, administrators, or assigns." In that case the words in the text in italics should be omitted.

of which such notice shall have been given as aforesaid, shall, upon the expiration of the said notice, and performance of the covenants hereinbefore contained relative thereto, on the part of the person or persons giving the same notice, cease, determine, and be void, any thing hereinbefore contained to the contrary notwithstanding. IN WITNESS, &c.

DETERMINABLE BY NOTICE AS TO PART AT ONE PERIOD, AND AS TO OTHER PART AT ANOTHER PERIOD.

(*a*) By stat. 4 Geo. 2, c. 28, s. 1, tenants for life, lives, or years, (which has been held not to extend to a weekly tenant, *Lloyd* v. *Rosbee*, 2 Campb. 453), holding over after the determination of their terms, and "demand made, and notice *in writing* by his or their landlords or lessors, or the person or persons to whom the remainder or reversion shall belong, his or their agents lawfully authorized," shall pay to the persons so kept out of possession, their executors, &c. *double the value*, to be recovered in any of his Majesty's Courts of Record, by action of debt, whereunto the defendant shall be obliged to give special bail.

Tenant holding over after notice from landlord, liable to double *value*.

The statute has been held not to extend to a *bonâ fide* holding over under a treaty, which afterwards went off, for a further term; *Anon.* cit. 5 Rep. 215; nor, where the lessee held over, under a further lease, granted by the preceding tenant for life, in alleged execution of a power, but which turned out to be invalid for want of compliance with the terms of it. *Wright* v. *Smith*, 5 Esp. 20.

In order to entitle the landlord to double value under this statute, notice in writing is necessary, even in cases where the tenancy, being for a period certain, would determine without notice. *Cobb* v. *Stokes*, 8 East, 358. It may be given either before or after the expiration of the tenancy, provided, in the latter case, the lessor have done no act to create a new tenancy; but where a notice, subsequent to the determination of the term, is given in the middle of a quarter, he cannot recover single rent for the fractional period which has elapsed of the quarter. *Cobb* v. *Stokes*, *sup.* No demand distinct from the notice is requisite, the notice itself being a sufficient demand. *Wilkinson* v. *Colley*, 5 Burr. 2694.

Notice in *writing* necessary.

The acceptance of single rent after the expiration of the notice amounts, of course, to a waiver of it. *Doe* d. *Cherry* v. *Batten*, Cowp. 243; *Ryal* v. *Rich*, 10 East, 48.

So, by stat. 11 Geo. 2, c. 19, s. 18, any *tenant* giving notice to quit, and not delivering up the possession accordingly, shall thenceforward pay to the landlord or lessor "double the rent or sum which he, she, or they would otherwise have paid," to be recovered in the same manner as the single rent.

Tenant holding over after giving notice to quit, liable to double *rent*.

This statute has been held to extend to a parol demise, and parol notice; *Timmins* v. *Rowlinson*, Bl. 533; *S. C.* Burr. 1603; but the notice must be effectual, *Johnstone* v. *Hudlestone*, 7 Dowl. & Ryl. 411; *S. C.* 4

Parol notice sufficient.

REMEDIES AGAINST TENANTS HOLDING OVER.

Barn. & Cress. 922, and the terms of it absolute and unequivocal. And therefore, where a tenant from year to year gave his landlord notice to quit *as soon as he could find another situation*, and he did afterwards get another situation, Lord *Ellenborough* held that the notice was too vague to bring the case within the statute. *Farrance* v. *Elkington*, 2 Campb. 591.

Distinction where the notice is from the landlord, and where from the tenant.

The principal distinction between the two statutes seems to be, that the former (*i. e.* where the notice proceeds from the landlord) requires the notice to be *in writing*, and gives double the *value*, to be recovered by action of debt, (but see *Messenger* v. *Armstrong*, 1 D. & E. 53), while the latter (*i. e.* where the tenant gives the notice) entitles the landlord to double *rent*, recoverable by the landlord's ordinary remedies. In *that* case the occupier seems to be regarded as a trespasser, in *this* as a tenant; and therefore, Lord *Ellenborough*, in *Soulsby* v. *Neving*, 9 East, 310, doubted whether a landlord could recover double *rent* (though he clearly may double *value*, *Cobb* v. *Stokes*, 8 East, 362) after bringing an ejectment, as that proceeding treats the defendant as a trespasser.

In addition to these remedies for double rent or value, a late statute gives to landlords a very summary means of recovering the possession from tenants holding over after notice to quit.

Stat. 1 Geo. 4, c. 87.

Thus, by stat. 1 Geo. 4, c. 87, it is enacted, that "where the term or interest of any tenant now or hereafter holding, under a lease or agreement in writing, any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired, or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the declaration, to address a notice to such tenant or person, requiring him to appear in the Court in which the action shall have been commenced, on the first day of the term then next following; or, if the action shall be brought in Wales†, or in the counties palatine of Chester, Lancaster, or Durham respectively, then on the first day of the next session or assizes, or at the court day, or other usual period for appearance to process then next fol-
[*448] *lowing, (as the case may be), there to be made defendant, and to find such bail if ordered by the Court, and for such purposes as are hereinafter next specified; and upon the appearance of the party at the day prescribed, or, in case of non-appearance, on making the usual affidavit of service of the declaration and notice, it shall be lawful for the landlord, producing the

† The jurisdiction given by this and the following sections to the Courts of Great Sessions in Wales is abolished by the 1 Wm. 4, c. 70.

REMEDIES AGAINST TENANTS HOLDING OVER.

lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have actually been enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit (as the case may be), and that possession has been lawfully demanded in manner aforesaid, to move the Court for a rule for such tenant or person to shew cause, within a time to be fixed by the Court, on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, beside entering into the common rule and giving the common undertaking, should not undertake, in case a verdict shall pass for the plaintiff, to give the plaintiff a judgment to be entered up against the real defendant, of the term next preceding the time of trial; or if the action shall be brought in Wales, or in the counties palatine respectively, then of the session, assizes, or court day (as the case may be), at which the trial shall be had, and also why he should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action; and it shall be lawful for the Court, upon cause shewn, or upon affidavit of the service of the rule in case no cause shall be shewn, to make the same absolute in the whole or in part, or to order such tenant or person within a time to be fixed, upon a consideration of all the circumstances, to give such undertakings and find such bail, with such conditions and in such manner as shall be specified in the said rule, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court to enlarge the time for obeying the same, then, upon affidavit of the service of such order, an absolute rule shall be made for entering up judgment for the plaintiff."

In ejectment against tenant holding over after notice, he may be compelled to give undertaking that plaintiff shall have judgment of the preceding term, and give security for costs.

Sect. 2 enacts, that "wherever hereafter it shall appear, on the trial of any ejectment at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease, entry, and ouster: but the production of the consent-rule and undertaking of the defendant shall in all such cases be sufficient evidence of lease, entry, and ouster; and the judge before whom such cause shall come on to be tried shall, whether the *defendant shall appear upon such trial or not, permit the plaintiff on the [*449] trial, after proof of his right to recover possession of the whole, or any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued, from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial, finding for the plaintiff, shall in such case give their verdict upon the whole matter, both

Consent rule to be evidence of lease, entry, and ouster, if defendant make default.

REMEDIES AGAINST TENANTS HOLDING OVER.

as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits: Provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing an action of trespass for the mesne profits which shall accrue from the verdict, or the day so specified therein down to the day of the delivery of possession of the premises recovered in the ejectment."

Judge may, after trial, stay execution till the fifth day of next Term, in certain cases.

Sect. 3, enacts, that "in all cases in which such undertaking shall have been given, and security found as aforesaid, if upon the trial a verdict shall pass for the plaintiff, but it shall appear to the judge before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, it shall be lawful for the judge to order the execution of the judgment to be stayed absolutely till the fifth day of the Term then next following, or till the next session, assizes, or court-day, (as the case may be), which order the judge, in all other cases, shall make upon the requisition of the defendant, in case he shall forthwith undertake to find, and on condition that within four days from the day of the trial he shall actually find, security by the recognizance of himself and two sufficient sureties, in such sufficient sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure, produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, (as the case may be): Provided always, that the recognizance last above mentioned shall immediately stand discharged and be of no effect, in case a writ of error shall be brought upon such judgment, and the plaintiff in such writ shall become bound with two sufficient sureties unto the defendant in the same, in such sum and with such condition as may be conformable to the provisions respectively made for staying execution on bringing writs of error upon judgments in actions of ejectment, by an act passed in England in the sixteenth and seventeenth years of the reign of King Charles the Second, and by an act passed in Ireland, in the seventeenth and eighteenth years of the reign of the same King, which acts *are respectively intituled, 'An Act to prevent Arrests of Judgments and superseding Executions.'"

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Manner of taking recognizances.

Sect. 4, enacts, that "all recognizances and securities entered into pursuant to the provisions of this act, may and shall be taken respectively in such manner, and by and before such persons as are provided and authorized in respect of recognizances of bail, upon actions and suits depending in the Court in which any such action of ejectment shall have been commenced; and that the officer of the same Court, with whom such recognizances of bail are filed, shall file such recognizances and securities, for which respectively the sum of two shillings and sixpence and no more

shall be paid: but no action or other proceeding shall be commenced upon any such recognizance or security, after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord."

REMEDIES AGAINST TENANTS HOLDING OVER.

Sect. 5 relates exclusively to the Courts of Great Session in Wales, the jurisdiction of which is now abolished. *Vide* stat. 1 Wm. 4, c. 70.

Sect. 6, enacts, that "in all cases wherein the landlord shall elect to proceed in ejectment, under the provisions hereinbefore contained, and the tenant shall have found bail as ordered by the Court, then if the landlord, upon the trial of the cause, shall be nonsuited, or a verdict pass against him upon the merits of the case, there shall be judgment against him, with double costs."

Landlord to pay double costs in certain cases.

Sect. 7, "Provided always, that nothing in this act contained shall be construed to prejudice or affect any right of action or remedy which landlords already possess, in any of the cases hereinbefore provided for."

Existing remedies not to be affected.

Sect. 8, enacts, that "this act shall extend to all parts of the United Kingdom of Great Britain and Ireland, except Scotland."

Local extent of act.

This statute has been held not to extend to tenancies from year to year created without writing. *Doe* d. Earl of *Bradford* v. *Roe*, 5 Barn. & Ald. 770. As to what is a sufficient service of the declaration in ejectment upon the tenant, see *Roe* v. *Doe*, 1 Dowl. & Ryl. 514, Ib. 563.

Statute does not extend to parol lettings.

OF HOUSE, WITH COVENANTS TO REPAIR, INSURE, &c.

LEASE, *from Devisees in Trust, in pursuance of their Trust, for twenty-one Years. With Covenants (amongst others, some usual, and some rather special,) to contribute proportionally towards cleansing Drains and Water-courses, used in common with the adjoining Tenants:—In the first Year of the Term, to put the Premises in good repair, and expend therein, or in substantial Improvements thereto (exclusive of internal Painting and Papering)* 500*l. at the least: that Lessors may, during the last six Months of the Term, place Notice on the Door, Window, &c. signifying that the Premises are to be let; and during such six Months enter on the Premises to shew same:* TO INSURE AGAINST FIRE *immediately; and within twenty-eight Days to shew Policy: to keep the Premises so insured, and shew the Policies; and make due Payments of the Premiums, Duty, and Charges of Insurance; in default thereof, Lessors to make such Payments, and recover the same by Distress: Money paid by Insurance Office to be expended in reinstating the Premises; or, if insufficient, or if the Lessee shall not continue the Insurance, then the Lessee to reinstate the Premises.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—; BETWEEN [*three lessors*], of &c., devisees in trust, named in the last will and testament of [*testator*], late of ——, in the county of ——, deceased, of the one part; and [*lessee*], of —— street, in the county

Testatum.

of Middlesex, carpenter, of the other part: WITNESSETH that the said [*lessors*], in pursuance of the trusts and authority vested in them by the will of the said [*testator*],

and in consideration of the yearly rent, covenants, and agreements, hereinafter reserved and contained, on the part of the said [*lessee*], his executors, administrators, and assigns, to be paid and performed, [*Have* demised, leased, and to farm letten, *And*] by these presents *Do* demise, lease, and to farm let, unto the said [*lessee*], his executors, administrators, and assigns, ALL THAT, &c., *(describe premises)*; ALL which said premises are more particularly delineated in the plan or ground plot thereof in the margin of these presents, and are numbered —, on a general plan of the estates at ——, late of the said [*testator*], annexed to an Indenture of Bargain and Sale, enrolled in ——— Term, 17—, Roll ——, in his Majesty's Court of Common Pleas, bearing date the —— day of ——, 17—, and made between, &c. TOGETHER with all and singular houses, outhouses, edifices, buildings, rooms, chambers, cellars, sollars, vaults, areas, lights, ways, paths, passages, drains, water-courses, sewers, commodities, advantages, and appurtenances whatsoever, to the said premises, or any part thereof, belonging or appertaining: EXCEPT out of this demise the free passage and running of water and soil from the other houses, late of the said [*testator*], and now of the said lessors, as his devisees, or their tenants, by and through the channels and drains belonging to the said premises. TO HAVE AND TO HOLD the said [piece or parcel of ground, messuage or tenement, buildings, and] premises, hereby demised, unto the said [*lessee*], his executors, administrators, and assigns, from the twenty-fifth day of March instant, for the full end and term of twenty-one years thence next ensuing; YIELDING AND PAYING therefore, yearly, during the said term, unto the said [*lessors*], their heirs, or assigns, the rent or sum of —— pounds, of lawful money of Great Britain, by equal payments, upon the days following, that is to say, the twenty-fifth day of March, the twenty-fourth day of June, the twenty-ninth day of September, and the twenty-fifth day of December, in every year, without any deduction or abatement whatsoever; and the first of the said quarterly payments to be made on the *twenty-fourth day of June now next ensuing. AND THE SAID [*lessee*], for himself, his heirs, executors, administra-

OF HOUSE, WITH COVENANTS TO REPAIR, INSURE, &c.

Devisees, in pursuance of trust, and in consideration of rent and covenants—

Demise.

Parcels.

Reference to marginal plans.

General words.

Except free passage for water and soil.

Habendum, for twenty-one years.

Reddendum quarterly.

OF HOUSE, WITH COVENANTS TO REPAIR, INSURE, &c.

tors, and assigns, doth hereby covenant with the said [*lessors*], their heirs and assigns, in manner following: that is to say, that the said [*lessee*], his executors, administrators, or assigns, shall and will (*pay rent and taxes, ut ante*, p. 420). And also shall and will contribute and pay, towards cleansing and repairing the drains and water-courses, which shall be used in common by him or them, or by the tenants or occupiers for the time being of the premises hereby demised, or any part thereof, and the owners or occupiers of any other messuages or tenements, erections or buildings, adjoining to, or connected with the drains and water-courses of the said demised premises, a fair proportion of the costs and charges thereof, according to the proportionate improved yearly value of the several premises using the same respectively: And also, shall and will, before the end of the first year from the commencement of this demise, put the premises hereby demised into good and substantial repair; and lay out and expend therein, or in substantial improvements to the said premises, exclusive of internal painting and papering, the sum of five hundred pounds, at the least: And shall and will, within six calendar months next after the said premises shall be so repaired or improved, render to the said [*lessors*], their heirs, or assigns, or to their surveyor or agent, the several bills, documents, and other evidence, requisite to prove to their satisfaction, that the aforesaid sum, at the least, hath been so expended and laid out; and thereupon the said [*lessee*], his executors, administrators, or assigns, shall be entitled to a certificate, that the same sum hath been duly expended, as aforesaid: And also shall and will, during the continuance of the term hereby granted, at his and their own cost and charges, keep the same premises, and every part thereof, in good and substantial repair and condition: And also, well and sufficiently repair, uphold, support, pave, scour, cleanse, glaze, empty, amend, and keep, all and every the party and other walls and fences, pavements, wydraughts, glass, glass-windows, and other the appurtenances belonging to *the said premises, in, by, and with, all needful and necessary reparations, cleansings, scourings, and amendments whatsoever, when, where, and so often as occasion shall

Covenant by lessee, to contribute proportionally towards cleansing drains &c.

In first year of term, to expend in repairs and improvements 500*l.*:

And within six months render bills, &c. to prove expenditure:

To keep the premises in good repair:

To repair party walls, pavements, glass-windows, &c.

[*454]

require; AND ALSO shall and will, in every fourth year of the said term hereby granted, at his or their own costs and charges, paint, or cause to be painted, all the outside wood and iron-work of or belonging to the said premises, with two coats of good and proper oil colour, in a workmanlike manner: AND shall and will, during the last year of the said term, empty and cleanse the privies, drains, and cess-pools of or belonging to the said premises: AND, that (*power of entry to view repairs, and covenant to repair on notice, ut ante*, p. 421.) AND ALSO shall and will, at the expiration or other sooner determination of the said term hereby granted, peaceably and quietly leave, surrender, and yield up unto the said [*lessors*], their heirs, or assigns, all the premises hereby demised, and the party walls, and fences, pavements, gutters, pipes, sinks, drains, wydraughts, necessaries, glass, glass-windows, and all other things thereunto belonging, in all respects, well and sufficiently repaired, maintained, upheld, supported, paved, purged, scoured, cleansed, glazed, emptied, amended, and kept, according to the true intent and meaning of these presents; *Together* with all such doors, locks, keys, latches, bolts, bars, staples, hinges, and other fastenings, hearths, marble, stone, and other chimney-pieces, mantle-pieces, jambs, foot-paces, slates, covings, sash and other windows, casements, window-shutters, partitions, wainscots, cupboards, dressers, shelves, drawers, bells, cranks, water-closets, basins, plugs, cisterns, pumps, water-pipes, and all other things, which, at the time of the commencement of this demise, or at any time afterwards, during the last seven years of the said term, shall be fixed or fastened in, upon, or about the premises hereby demised, or any part thereof, whole, undefaced and fit for use: AND ALSO, that the said [*lessee*], his executors, administrators, or assigns, shall not, nor will, use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on, in or upon the said demised premises, or any part thereof, the trades of a butcher, baker, soap-boiler, victualler, alehouse-keeper, *tallow-chandler, smith, brazier, tinman, or any other noisy or offensive trade whatsoever (*a*); or erect any building in

OF HOUSE, WITH COVENANTS TO REPAIR, INSURE, &c.

Every fourth year, to paint all the outside wood and iron-work:

In last year, to empty the privies, drains, and cess-pools.

At the end of term, peaceably to leave premises; and the party walls, windows, &c. well repaired;

Together with all doors, locks, &c. which at the time of the demise, or within the last seven years, shall be fixed or fastened to the premises.

That lessee shall not carry on, or permit to be carried on, any noisy or offensive trades.

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Or erect any

(*a*) Clauses of this nature frequently give rise to questions, as to what are offensive trades. It is in general better, therefore, if an enumeration

OF HOUSE, WITH COVENANTS TO REPAIR, INSURE, &c.

building in the yard, higher than twelve feet, without licence.

That lessors shall have liberty of water-course.

That their workmen may enter, to repair adjoining premises, or empty drains, &c.

That lessors may, during last six months of term, place notice signifying that premises are to be let.

And during such six months enter on premises, to shew same.

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To insure

the yard or garden of the said demised premises, higher than twelve feet above the parlour floor thereof, without having first obtained the licence and consent in writing of the said [*lessors*], their heirs or assigns: AND ALSO, that the said [*lessors*], their heirs, or assigns, and their tenants, shall have free liberty of water-course in and through the hereby demised premises, to carry off the water and soil from the near or adjoining tenements: AND that it shall be lawful for their workmen, at all seasonable times, in the day-time, to enter upon the premises hereby demised, or any part thereof, for the purpose of repairing such near or adjoining premises, or emptying or cleansing the drains, necessaries, gutters, or cess-pools thereto belonging: AND ALSO, that it shall be lawful for them, the said [*lessors*], their heirs, or assigns, or their agent or agents, at all times, during the last six calendar months of the term hereby granted, to place a notice, in writing, on the door, or on any window or other conspicuous place of the hereby demised premises, signifying that the same are to be let; and, during the said six *months, to enter and come, at seasonable times in the day-time, upon the premises, to shew and treat for the same: AND FURTHER, that the said [*lessee*], his executors,

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is attempted, to include as many as possible, especially any to which it may be intended that the clause shall extend, that are not clearly of this description. In *Jones* v. *Thorne*, 3 Dowl. & Ryl. 152, there was a condition for re-entry, if the lessee should suffer any person to carry on the business of a brewer, bagnio-keeper, distiller, dyer, pipe-burner, melting tallow-chandler, soap-boiler, farrier, smith, or iron-founder, or permit or suffer a forge to be erected, or suffer the same to be made use of as a sponging or lock-up house, or sheriff's office, lottery office, or any other public office whatever, or as or for any auction or sale room, or broker's shop, *or any other trade or business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the tenants of the lessor;* and the question was, whether letting the house to a *licensed victualler* was a breach of the condition: and the Court decided that it was not; for that they could not hold a public house, *per se*, *i. e.* without any proof that it had become actually offensive), to be a nuisance.

The business of a licensed victualler held not to be an offensive trade.

For clause prohibiting the exercise of *any* trade upon the demised premises, *vide ante*, p. 433.

administrators, or assigns, shall and will, immediately upon the execution of these presents, insure, or cause to be insured, in the names as well of the said [*lessee*] as of the said [*lessors*], all the buildings hereby demised, with such additions and improvements as aforesaid, from or against loss or damage by fire, in the Imperial Fire Office, in London, in a competent sum to cover the full value thereof; and within twenty-eight days then next shall and will shew to the [*lessors*], their heirs, or assigns, or their steward, receiver, or agent, the policy of insurance, which shall be so made, in order that the person or persons to whom the same shall be so shewn shall and may take an account of the particulars and conditions thereof: AND ALSO shall and will keep the premises so insured in the same office, or in such other office or offices in London or Westminster, as shall from time to time be directed by the said [*lessors*], their heirs, or assigns; and produce and shew the policies to be taken, from time to time, in manner and for the purposes hereinbefore mentioned: AND shall and will make due and regular payments of the premiums, duty, and charges, which shall become due and payable in respect of every such insurance: AND, in default thereof, it shall be lawful for the said [*lessors*], their heirs, or assigns, to make such payments, and to recover the same by distress on the premises so insured, in the same manner as for rent in arrear. AND *it is hereby mutually agreed* between the parties hereto, that all and every the sums and sum of money, which shall be paid by the proprietors or directors of any insurance office, by virtue of any policy or policies made of all or any part of the premises aforesaid, shall, with all convenient speed, be expended for or towards the rebuilding, reinstating, or making fit for habitation, the premises hereby demised, or such part thereof as shall be burned down, or damaged by fire: and that, if the sum or sums so paid be insufficient for the same, or, if the said [*lessee*], his executors, administrators, or assigns, shall not make and continue such insurance as aforesaid, then, and in such case, he or they shall and will, at his or their own proper costs and charges, *rebuild, reinstate, and make fit for habitation, or cause to be substantially rebuilt, reinstated, and made fit for habi-

OF HOUSE, WITH COVENANTS TO REPAIR, INSURE, &c.

against fire immediately;

And within twenty-eight days to shew policy.

To keep premises so insured;

And shew policies.

And make due payments of the premiums, &c.

In default thereof, lessors to make such payments, and recover same by distress.

Money paid by insurance office to be expended in reinstating premises.

Or if insufficient, or if lessee shall not continue insurance, then lessee to reinstate premises.

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OF HOUSE, WITH COVENANTS TO REPAIR, INSURE, &c.

tation, the premises hereby demised, or such part thereof as shall be so burned down, or damaged by fire, as aforesaid. But it is hereby declared, that the said rent hereby reserved, or any part thereof, shall not be suspended during the period that the said demised premises, or any part thereof, shall be rendered uninhabitable, or unfit for use, by fire as aforesaid, and before the same shall be rebuilt, or reinstated, as hereinbefore provided. (*Add proviso for re-entry, and covenant for quiet enjoyment, ut ante*, pp. 422, 423). IN WITNESS, &c.

Power of re-entry, on non-payment of rent.

LEASE OF PUBLIC-HOUSE, (COPYHOLD) DETERMINABLE ON BANKRUPTCY, &c.

LEASE *of a* PUBLIC-HOUSE, *of* COPYHOLD *Tenure, for One Year, and thenceforth from Year to Year, for six Years and a Half, if the Custom or Lord of the Manor will permit the Premises to be so demised; with a* POWER OF RE-ENTRY, (inter alia), *on Lessee* ASSIGNING *or* UNDER-LETTING *without Consent; or becoming* BANKRUPT *or* INSOLVENT, *or* EXECUTION *being levied on his* GOODS *&c.—Covenant by Cestuis que Trust and Lessor for quiet Enjoyment.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—; BETWEEN [*lessor*], of &c., of the first part; [*two cestuis que trust*], of &c., of the second part; and [*lessee*], of &c., ale-house-keeper, of the third part; WITNESSETH, that in consideration of the yearly rent hereinafter reserved, and of the covenants and stipulations hereinafter contained, and which, on the part of the said [*lessee*], his executors and administrators, are to be performed and observed, *The* said [*lessor*] *Hath* demised and leased, *And* by these presents *Doth* demise and lease unto the said [*lessee*], his executors, and administrators, ALL THAT messuage and public-house, situate in —— [*458] *aforesaid, and called "The Falcon," with the out-buildings, yards, garden, bowling-green, and appurtenances thereto belonging, as the same are now in the occupation

Parties.

Testatum.

In consideration of rent, and covenants, lessor demises.

Parcels.

of the said [*lessee*], or his under-tenant or under-tenants; EXCEPT, and reserved unto the said [*lessor*], his heirs and assigns, and his and their workmen and agents, free liberty of ingress, egress, and regress, into, out of, and from the said demised premises, to view and see the state and condition thereof; and to do repairs thereto, and bring materials thereon for such repairs, and on all other reasonable occasions; TO HAVE AND TO HOLD the said demised premises, (being copyhold), unto the said [*lessee*], his executors and administrators, from the date of these presents for the term of one year now next ensuing, and, if the custom or lord for the time being of the manor, whereof the said premises are holden, will permit or suffer the same to be so demised, but not otherwise (*a*), thenceforth from year to year, for and during and until the expiration of the further term of six years and one half of another year; YIELDING AND PAYING therefore, unto the said [*lessor*], his heirs or assigns, the rent or sum of 10*l.* of lawful British money, on the eleventh day of October next, and thenceforth yearly, during the term of seven years thence next ensuing, the rent or sum of 15*l.* of like money, by two equal portions, that is to say, one half year's rent, on the sixth day of April, and another half year's rent on the eleventh day of October, in every year, except only during such period as the said premises may remain uninhabitable, by reason of destruction by fire or other inevitable accident (*b*); PROVIDED, that if the said several rents, or any part thereof respectively, shall be unpaid by the space of twenty-one days next after the same shall have become payable, (being first lawfully demanded upon or at any time after the said twenty-one days, and not paid when demanded (*c*);) *Or* if the said [*lessee*], his executors, or *administrators, shall assign, let, or under-let, or in any manner part with the possession of the said demised premises, or any part thereof, to any person or persons whom-

LEASE OF PUBLIC-HOUSE, (COPYHOLD) DETERMINABLE ON BANKRUPTCY, &c.

Except right of entry to view condition, to do repairs, &c.

Habendum for one year, and thenceforth, if the custom or lord of the manor will permit, from year to year, for six and half years.

Reddendum, 10*l.* for first half year, and 15*l.* yearly for seven years.

Power of re-entry, on non-payment of rent.

or, on assigning or underletting premises without consent.

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(*a*) As to leases of copyholds, *vide ante*, p. 325.

(*b*) See a more particular provision for this event, *ante*, p. 425, and some observations on the fairness and propriety of such a limitation of the tenant's liability, *post*.

(*c*) As to these words, *vide ante*, p. 423.

LEASE OF PUBLIC-HOUSE, (COPYHOLD) DETERMINABLE ON BANKRUPTCY, &c.

soever, for the whole or any part of the term for which they are intended to be hereby demised, without the licence or consent of the said [*lessor*], his heirs or assigns, in writing, under his or their hand or hands, first obtained for so doing; *Or* if the said [*lessee*], his executors or administrators, or any of them, shall become bankrupt or bankrupts, or shall assign his or their estate or effects, or any part thereof, in trust for his or their creditors, or shall take the benefit of any act or acts of Parliament, passed, or to be passed, for the relief of insolvent debtors, or shall compound for the payment of his or their debts; or if any execution shall be levied upon his or their goods or chattels (*d*); or if he or they shall not perform the covenants herein contained, which by him or them ought to be performed; *Then*, and in either of the said cases, it shall be lawful for the said [*lessor*], his heirs or assigns, into the said demised premises, or any part thereof in the name of the whole to re-enter, and the same to have again, repossess, and enjoy, as in his or their first or former estate; [and the said [*lessee*], his executors and administrators, and all other occupiers of the said demised premises, thereout and therefrom wholly to eject, expel, and amove; and thereupon the residue of the aforesaid several terms shall cease and determine]. And the said [*lessee*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*lessor*], his heirs, and assigns, as follows: that is to say, that he the said [*lessee*], his executors, or administrators, shall or will pay to the said [*lessor*], his heirs, or assigns, the aforesaid rent or sum of 10*l.* on the 6th day of April next, and thenceforth the aforesaid rent or yearly sum of 15*l.* at the days and in the manner hereinabove appointed for the payment thereof, subject nevertheless to the exception hereinbefore contained: And also, that he the said [*lessee*], his executors or administrators, shall and will, during the continuance of this demise, *keep, and, at the termination thereof, leave in repair the glass and lead of all the windows of the buildings hereby demised, (damage by fire

or on lessee becoming bankrupt, &c.

or on non-performance of covenants.

Covenant by lessee to pay the rent;

to keep and leave in repair all the glass windows:

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(*d*) As to clauses of this nature, *vide ante*, pp. 362, 363.

LEASE OF PUBLIC-HOUSE, (COPYHOLD) DETERMINABLE ON BANKRUPTCY, &c.

or other inevitable accident only excepted): AND ALSO keep and leave, in a proper state and condition, the aforesaid garden and bowling-green: AND shall and will, with all convenient speed, repair, and make good again, all such injuries, breaches, and damages, as shall happen or be done to the said demised premises, by the negligence or fault of the said [*lessee*], his executors, administrators, or assigns, or his or their inmates, servants, guests, or customers: AND FURTHER, that he, the said [*lessee*], his executors, administrators, or assigns, shall not, nor will, at any time during the continuance of this demise, convert the said messuage into a private house, or use the same, or suffer it to be used, for any other purpose than as an inn, tavern, or public-house: AND shall and will conduct and manage the same in a proper and orderly manner, so as to afford no ground or pretence for discontinuing the licences thereof; but shall and will use his and their best endeavours, at all times, to increase and extend the custom and business thereof (*e*). AND THE SAID [*lessor*] doth hereby for *himself, his heirs, executors, administrators, and assigns,

to keep and leave in proper condition garden and bowling-green;
to repair damage:
not to convert house into a private house:

to so manage the house as not to lose the licence;

to endeavour to extend the custom.

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Covenant by lessor to keep the buildings in repair.

(*e*) Where the public house belongs to a brewer, the following clause is frequently added:—

"*And further*, that he the said [*lessee*], his executors, administrators, or assigns, shall not, nor will, during the said term hereby granted, buy, receive, sell, or dispose of, either directly or indirectly, or permit to be bought, received, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the messuage or tenement, and public-house and premises hereby demised, or any part thereof, any wine, brandy, rum, hollands, geneva, shrub, beer, ale, porter, stout, purl, perry, cider, or any other spirit or liquor whatsoever, other than such as shall have been *boná fide* purchased of the said [*lessor*], his executors, administrators, or assigns, provided he or they shall at such time deal in and vend such liquors as aforesaid, and shall be willing to supply the same to the said [*lessee*], his executors, administrators, or assigns, at the fair current market price thereof."

Covenant to sell such liquors only as have been purchased of the lessor.

LEASE OF PUBLIC-HOUSE, (COPYHOLD) DETERMINABLE ON BANKRUPTCY, &c.

covenant with the said [*lessee*], his executors, and administrators, that he the said [*lessor*], his heirs, executors, administrators, or assigns, shall and will, during the continuance of this demise, keep the buildings hereby demised in tenantable repair, (except the parts hereinabove covenanted to be repaired by the said [*lessee*], his executors or administrators): AND LASTLY, the said [*lessor*], and the above-named [*cestuis que trust*] (*a*), do hereby for themselves severally, and for their respective heirs, executors, and administrators, and not one for the other or others of them, nor for the heirs, executors, administrators, acts, or deeds of the other or others of them, covenant with the said [*lessee*], his executors and administrators, that he and they (paying the rents hereby reserved, and performing the covenants herein contained, which on his and their part are to be performed), shall and may occupy, possess, and enjoy, the said demised premises, for and during the aforesaid several terms, without any interruption or denial from or by them, the said [*lessor*] and [*cestuis que trust*], or any of them, or the heirs, executors, administrators, or assigns, of any of them. IN WITNESS, &c.

Covenant by lessor, and *cestuis que trust*, severally, for peaceable enjoyment.

(*a*) For general forms of leases by mortgagees and trustees, with the concurrence of the mortgagor and *cestuis que trust*, *vide post*, p. 561.

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FURNITURE.

LEASE *of* FURNITURE *in a House.*

THIS INDENTURE, &c. BETWEEN [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part; *(recital of a lease bearing even date, &c. from* [*lessor*] *to* [*lessee*], *of a house, &c., for seven years, determinable by* [*lessee*] *at the end of the first or third year, at the yearly rent of* £——, *payable quarterly, &c.)* AND WHEREAS the several articles of furniture mentioned and specified in the schedule hereunder written, or hereunto annexed, are to be held and enjoyed with the said messuage and premises comprised in

Recital of lease of messuage.

Agreement to let furniture.

the said term of seven years, during the continuance of the term therein, and the said [*lessee*], his executors, and administrators, is and are to pay an additional rent or annual sum of £——, for or in respect of the same furniture, NOW THESE PRESENTS WITNESS, and the said [*lessor*] doth hereby grant, and also covenant and agree to and with the said [*lessee*], his executors, and administrators, that the said [*lessee*], his executors and administrators, shall and may have, hold, use, and enjoy, in and upon the said messuage, the several articles of furniture mentioned or specified in the schedule hereunder written, or hereunto annexed, during such time as the estate and interest of the said [*lessee*], his executors, or administrators, in the same messuage shall continue, under and by virtue of the said indenture of lease thereof, and as the said [*lessee*], his executors or administrators, shall pay the rent or annual sum hereby agreed to be paid for or in respect of the furniture, and not in any other manner, or for any further or other time, and not in any other house or place whatsoever. AND the said [*lessee*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*lessor*], his executors, and administrators, that, from time to time, during the continuance of the said term of seven years, determinable as aforesaid, *granted to him and them in the said messuage and premises, he, the said [*lessee*], his executors, or administrators, shall and will well and truly pay, or cause to be paid, unto the said [*lessor*], his executors, administrators, or assigns, the sum of £—— a year, in addition to and in increase of the said yearly rent of £——, reserved by the said recited indenture of lease, and at or on the said days or times appointed for payment of the same rent of £—— a year as aforesaid, and clear of all deductions on any account whatsoever, the first payment to be made on the —— day of —— next: AND THAT the said additional rent or yearly sum of £——, shall or may be distrained for, on the said messuage and premises, by the said [*lessor*], his executors, administrators, or assigns, in the same or like manner as if the same sum of £—— was reserved to be paid out of the said messuage and premises comprised in the said term of seven years; *And that* he the said [*lessee*], his

FURNITURE.

Testatum.

Furniture to be enjoyed by lessee during the term for which the house is demised.

Covenant by lessee to pay yearly sum.

[*463]

That it may be distrained for.

Not to injure or

FURNITURE.

remove the furniture.

executors, or administrators, shall not, nor will, at any time during the continuance of the term hereby granted therein, wilfully injure all or any of the said articles of furniture, or use them as furniture for any other house than the said messuage, and as far as circumstances will admit, and, the reasonable use thereof only excepted, shall or will keep and preserve the same articles of furniture in such, or the same, or the like state as at present, and supply and make good (by replacing articles of the same sort and value), all such articles of furniture as shall be broken or destroyed by any unavoidable accident; And on the expiration or sooner determination of the term in the said messuage and premises, comprised in the said term of seven years, shall or will deliver to the said [*lessor*], his executors, administrators, or assigns, or leave in or upon the said messuage and premises, comprised in the said term of seven years, all the said articles of furniture in as good preservation as the same now are, except such articles as shall be broken as aforesaid, and in lieu thereof all such articles as shall have been substituted in place of those articles as aforesaid. IN WITNESS, &c.

To replace articles that may be broken or destroyed.

To deliver up same at the end of term.

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AGREEMENT TO LET HOUSE AND FURNITURE, FROM YEAR TO YEAR.

DEMISE, *(in the Form of an Agreement), of a* HOUSE *from Year to Year, until determined by one of the Parties; And* AGREEMENT *that the Tenant shall hold the* FURNITURE *mentioned in a Schedule, while he occupies the House.*

Parties.

MEMORANDUM OF AN AGREEMENT, entered into this —— day of ——, 18—; BETWEEN [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part.

Letting from year to year.

THE said [*lessor*] doth hereby [agree to (*a*)] let unto the said [*lessee*]; and the said [*lessee*] doth hereby agree

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(*a*) These words, though generally used in agreements of this kind, per-

to take of the said [*lessor*], ALL THAT messuage or tenement of him the said [*lessor*], situate in —— aforesaid, with the yards, garden, building, and appurtenances thereto belonging, now in the occupation of the said [*lessee*], for one whole year, from the —— day of ——, instant, and so on, from year to year, until this agreement shall be determined by one of the said parties giving, in the first or any subsequent year, to the other of them —— calendar months' notice, in writing, for that purpose: AT and under the yearly rent of —— pounds, payable by equal half yearly payments, on the —— day of ——, and the —— day of ——, in each year, without any deduction, AND *it is also agreed* between the said [*lessor*] and [*lessee*], that the said [*lessee*] shall and may *have, hold, use, and enjoy, in and upon the said messuage and premises, the furniture and other effects belonging to the said [*lessor*], and mentioned or specified in the schedule hereunder written, during such time as the said [*lessee*] shall continue to hold and occupy the said messuage and premises under this agreement; but not in any other manner, or for any further or other time, and not in any other house or place whatsoever: AND that he, the said [*lessee*], his executors or administrators, shall pay to the said [*lessor*], his executors, administrators, or assigns, for the use of the said articles of furniture, the sum of —— pounds a year, in addition to the said yearly rent of —— pounds, and by half yearly payments, on the days and times appointed for the payment of the said rent of —— pounds, and clear of all deductions on any account whatsoever. AND the said [*lessee*] doth hereby agree with the said [*lessor*], that he, the said [*lessee*], his executors or administrators, shall and will, from time to time, during the time he shall continue to hold and occupy the said

AGREEMENT TO LET HOUSE AND FURNITURE, FROM YEAR TO YEAR.

Rent payable half yearly.

Tenant to hold furniture, while he occupies the house.

[*465]

But not in any other place, &c.

Tenant to pay an additional rent for furniture.

Agreement by tenant to repair windows, &c.

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haps are more properly omitted, the instrument being intended to operate as an actual demise; and though there can be no doubt that such would be the construction of the instrument even with those words, yet it is better to avoid the least pretext for an argument for construing the agreement as executory; since the question has given rise to so much litigation. *Vide ante*, p. 331 *et seq.*

AGREEMENT TO LET HOUSE AND FURNITURE, FROM YEAR TO YEAR.

messuage and premises under this agreement, well and substantially repair, and keep repaired, at his or their own expense, all the glass and other windows, window-shutters, locks, fastenings, bells, and all other fixtures, in, upon, and belonging to the said premises; and leave the same in such good repair, at the time of quitting the occupation of the said premises: AND shall not, nor will, wilfully injure all or any of the said furniture and effects, or use them as furniture for or in any other house than the said messuage; AND, so far as circumstances will admit, (and the reasonable use thereof only excepted,) shall and will keep and preserve the same in such, or the same, or the like state and condition as at present; AND supply and make good (by replacing articles of the same sort and value), all such articles of furniture and effects as shall be broken, or destroyed, by any unavoidable accident; AND, at the time of quitting the occupation of the said messuage and premises, shall and will deliver up to the said [*lessor*], his executors, administrators, or assigns, or leave in or upon the said messuage or premises, all the said furniture, and other effects, in such state and condition as aforesaid; except such articles as shall be broken or destroyed, as *aforesaid; and, in lieu thereof, all such articles as shall have been substituted in place of those articles, as aforesaid. WITNESS the hands of the said [*lessor*] and [*lessee*].

Not to injure furniture or use same in any other house.

And preserve same in such condition as at present:

And make good broken articles.

At quitting, deliver to landlord furniture in such condition as aforesaid;

[*466]

With articles substituted as aforesaid.

Schedule.

THE SCHEDULE to which the above-written memorandum of agreement refers.

MANSION-HOUSE, FURNITURE, GARDEN, AND PLEASURE-GROUNDS.

LEASE *of a* MANSION-HOUSE, FURNITURE, GARDEN, *and* PLEASURE-GROUNDS, *containing, in addition to ordinary Clauses,* REDDENDUM *on Breach of certain* COVENANTS, *Special* COVENANTS, *for the* PRESERVATION *of the* FURNITURE—MANAGEMENT *of the* GARDEN, FRUIT TREES, PLEASURE-GROUNDS, &c.; *a third Person joining in the Covenants, as* SURETY *for the* LESSEE—*Covenant by* LESSOR *to* PAY TAXES, *or allow the* LESSEE *to* DEDUCT *them out of the* RENT.

THIS INDENTURE, made &c., BETWEEN [*lessor*], of &c., of the first part; and [*lessee*], of &c., of the second part; and [*lessee's surety*], of the third part; WITNESSETH, that, in consideration of the yearly rents hereby reserved, and of the covenants, conditions, and agreements hereinafter contained, by the said [*lessee*], his executors, administrators, and assigns, to be respectively paid, observed, and performed; the said [*lessor*] *Hath* demised, leased, and to farm letten, and by these presents *Doth* demise, lease, and to farm let unto the said [*lessee*], his executors, administrators, and assigns, ALL THAT capital messuage and dwelling-house, situate in the parish of ——, in the county of ——, and commonly called or known by the name of —— Lodge, with the out-buildings, gardens, shrubberies, and pleasure-grounds thereunto belonging; *And also,* all the fixtures and articles of furniture in and belonging to the said messuage or tenement, mentioned and comprised in the schedule or inventory hereunto annexed (*a*), and signed by the said [*lessor*] (*b*); *And* [*467]

Parties.

Testatum.

Parcels.

(*a*) *Or* "hereunder written;" for it is always better that the schedule should form part of the instrument. It need not then be separately signed.

(*b*) Where a person lets a freehold house, with furniture, it is obvi- Question, where

MANSION-HOUSE, FURNITURE, GARDEN, AND PLEASURE-GROUNDS.

also ALL THAT close, piece, or parcel of meadow or pasture land, situate, lying, and being in front of the said messuage or dwelling-house, and partly surrounding the same, containing by estimation twelve acres or thereabouts; [*468] **And also* ALL THAT other close, piece, or parcel of meadow or pasture land, situate, lying, and being behind the said dwelling-house, and containing by estimation six acres or thereabouts; *And also* ALL THAT wood, or piece or parcel of wood ground, situate, lying, and being near unto the

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house and furniture, being let together, subsequently belong to different persons.

ous, that, at his death, the house and furniture, unless disposed of by him by will or otherwise to the same individual, will belong to different persons; the former devolving to the real, and the latter to the personal representatives. In such cases, as the rent issues out of the house alone (*vide ante*, p. 354), the person entitled to it would take the *whole* rent, and the person entitled to the furniture would derive no benefit from it until the termination of the lease. If the tenancy was from year to year, and not for a specific term, a nice question might arise between the owners of the house and of the furniture, in regard to the power of determining the tenancy. As the furniture, strictly speaking, constitutes no part of the demised premises, the owner of it would have no power to determine the tenancy by notice, and yet there would be a manifest injustice in permitting the owner of the house, by continuing the tenancy, to appropriate to himself the whole benefit of the property of another. In such a case, it would probably be held, that the owner of the furniture might maintain an action of trover for it, after giving such notice as the person under whom he claimed would have been bound to give; namely, six months' notice, expiring at the same period of the year as the tenancy commenced. If the goods can thus be taken from the lessee, justice obviously requires, that the tenancy should be at an end as to him, and that he should not continue liable to pay the same rent for the house alone, as he was to pay for both the house and furniture; and to this conclusion it is probable the Courts would arrive, in opposition to the doctrine of *Emott* v. *Cole*, Cro. El. 255, where a tenant, to whom lands and goods were let, being deprived of the goods, was held *not* to be entitled to an apportionment (*vide ante*, p. 354). This doctrine would then rank among the many early technical rules which have been subverted by modern decisions, where those rules operated to produce moral injustice. The Editor has pointed the attention of the reader to these difficulties, in order that they may be provided against when houses and furniture are let together under such circumstances. An obvious mode of effecting this is, to reserve distinct rents, *ut ante*, p. 464.

said messuage or dwelling-house, with the shrubbery and gravel walk through the same, containing by estimation ten acres or thereabouts; and which said messuage or dwelling-house, closes, pieces, or parcels of land, wood, and premises are now in the occupation of the said [*lessor*], and the same are more particularly delineated and described in the plan or ground plot thereof, drawn in the margin of these presents; *Together* with all and singular outhouses, buildings, stables, yards, ways, waters, watercourses, hedges, fences, easements, profits, advantages, rights, members, and appurtenances whatsoever to the said several premises belonging or appertaining, or usually held, occupied, and enjoyed therewith, or with any part thereof: TO HAVE AND TO HOLD the said messuage or dwelling-house, furniture, lands, wood, or wood ground, and all and singular other the premises hereby demised, or intended so to be, with their appurtenances, unto the said [*lessee*], his executors, administrators, and assigns henceforth during the full term of —— years: YIELDING AND PAYING therefore unto the said [*lessor*], his heirs and assigns, during the said term, the yearly rent of £——, of lawful British money, in even portions, half-yearly, on the —— day of ——, and the —— day of ——, in every year; *And also* YIELDING AND PAYING yearly, unto the said [*lessor*], his heirs or assigns, on the days aforesaid (above the said yearly rent of £—— hereinbefore reserved), for every acre of meadow or pasture ground which the said [*lessee*], his executors, administrators, or assigns shall plough, break up, or convert into tillage, contrary to the covenant hereinafter contained, the yearly rent of 100*l.* of like lawful money, during the then residue of the said term; the first payment of the said additional rent to be made on such of the said days hereinbefore appointed for payment of rent, as shall happen next after such ploughing, breaking up, or conversion into tillage as aforesaid; AND in case the said [*lessee*], his executors, administrators, or assigns shall *be guilty of any breach or non-performance of any of the several covenants or agreements hereinafter contained on the part of the said [*lessee*], his executors, administrators, and assigns, to repair the said demised premises, and to

MANSION-HOUSE, FURNITURE, GARDEN, AND PLEASURE-GROUNDS.

General words.

Habendum.

Reddendum.

Reddendum of 100*l.* an acre for ploughing meadow.

Reddendum of additional rent for breach of covenant.

MANSION-HOUSE, FURNITURE, GARDEN, AND PLEASURE GROUNDS.

preserve the said furniture, and to preserve the timber trees and other trees on the said demised premises, and not to assign, under-let, or otherwise dispose of or part with the possession of the said demised premises, as is hereinafter more fully mentioned and expressed; Then also, on any and every such breach or non-performance, YIELDING AND PAYING unto the said [*lessor*], his heirs or assigns, the further additional yearly rent of 200*l.*, during the said term, on the days and in manner aforesaid; the first payment of the rent lastly hereinbefore reserved to be made on such of the aforesaid days of payment as shall happen next after any and every such breach or non-performance as aforesaid. AND the said [*lessee*], and the said [*surety*], as his surety, do hereby for themselves jointly, and for their heirs, executors, administrators, and assigns (*c*), and each of them doth for himself severally, his heirs, executors, administrators, and assigns, covenant and agree with the said [*lessor*], his heirs and assigns, that they the said [*lessee*] and [*surety*], or one of them, their, or one of their executors, administrators, or assigns, will pay or cause to be paid unto the said [*lessor*], his heirs or assigns, the said yearly rents hereby reserved at the times and in manner hereinbefore appointed for the payment thereof respectively; *And also*, that the said [*lessee*], his executors, administrators, and assigns, will, at all times [*470] *during the continuance of the said term hereby granted, as often as occasion shall require, at his or their own expense, sufficiently repair, maintain, paint, and preserve the said messuage or dwelling-house, with the stables, outbuildings, and appurtenances thereunto belonging, and all other the erections and buildings standing or being on

Joint and several covenants by lessee and his surety for payment of the rent.

—To repair.

As to distress on furnished house.

(*c*) In the case of a furnished house, it is obvious that the landlord's security for his rent is more precarious than in that of an unfurnished house, where he has the lessee's furniture to distrain; in such a case, therefore, there is the greater reason for requiring the junction of a surety in the lessee's covenants. It must not be inferred from the preceding observation, that the landlord of a furnished house has not the same right of distress over any distrainable property of the tenant he may find upon the premises; but merely that, under such circumstances, it is likely to be inconsiderable.

MANSION-HOUSE, FURNITURE, GARDEN, AND PLEASURE GROUNDS.

the said demised premises, or any part thereof; and will keep the said demised premises, with all the walls, rails, fences, drains, sinks, sewers, and appurtenances thereunto belonging, in good and tenantable repair and condition, (accidents by fire only excepted); And will not remove, or cause or suffer to be removed from out of the said messuage or dwelling-house and premises, any of the articles of furniture in or about the same, and which are hereby demised therewith; but will at all times, during the continuance of this present demise, carefully preserve the same furniture from being lost, or in any manner damaged or injured, (reasonable use and wear thereof and accidents by fire only excepted); *And also*, that the said [*lessee*], his executors, administrators, or assigns, will from time to time during the continuance of the present demise, keep the gardens and garden-ground belonging to the said messuage or dwelling-house well cropped and manured, and manage the same according to approved methods of gardening; *And that* he or they will not cut down or destroy any of the fruit-trees or any other trees now growing, or which shall at any time or times during the said term hereby granted, grow in the said gardens, (except such trees as shall be decayed, or shall cease to be productive of fruit), but will carefully preserve the same trees, except as aforesaid, and cause the said fruit-trees to be properly pruned at seasonable times of the year; *And that* he or they will plant, in the place or stead of every fruit-tree which shall be decayed or become unproductive during the said term, and which shall be cut down by him or them, a thriving tree of proper growth, of the same sort of fruit; *And also*, that the said [*lessee*], his executors, administrators, or assigns, will not, at any time during the continuance of this present demise, fell, cut down, lop, top, or carry away any of the timber or other trees now growing or being, and which shall at *any time or times during the said term grow or be, upon the other parts of the said demised premises, but will preserve the last-mentioned trees, and all the shrubberies, hedges, and underwood belonging to the said premises, from damage or injury by cattle or otherwise; and will also keep the said pleasure-grounds and ornamental plot

—Not to remove furniture.

—To keep the gardens in order.

—To preserve the fruit-trees.

—To plant fresh trees in the room of decayed trees.

—Not to cut timber trees.

[*471]

—To keep pleasure-grounds in order.

MANSION-HOUSE, FURNITURE, GARDEN, AND PLEASURE-GROUNDS.

of the said premises in good order, as the same have been usually kept by the said [*lessor*], and will not use the same for any other purposes than those of pleasure and ornament; nor will commit, or suffer to be committed, on the said demised premises, or any part thereof, any waste, spoil, or destruction whatsoever; *And also*, that the said [*lessee*], his executors, administrators, or assigns, will not, at any time during this present demise, plough, break up, or convert into tillage, all or any of the meadow or pasture-ground hereby demised, without first obtaining the licence or consent in writing of the said [*lessor*], his heirs or assigns, for that purpose; *And also*, that the said [*lessee*], his executors, administrators, or assigns, will, in every year during the said term, cause all the dung, manure, and compost to arise from the said demised premises, or any part thereof, to be spread or bestowed in a husband-like manner, upon the land or ground hereby demised, on such part thereof as shall stand most in need of manure; and that he or they will not in anywise impoverish or deteriorate the land or ground hereby demised, or any part thereof; but will, at all times during the said term, use, manage, and cultivate the same in a husband-like manner; *And also*, that the said [*lessee*], his executors, administrators, or assigns, will not, at any time or times during the said term hereby granted, assign, demise, or otherwise (except by testamentary disposition) dispose of or in anywise part with the possession of the said hereby demised premises, or any part thereof, to any person or persons whomsoever, for the whole or any part of the said term, without the licence or consent of the said [*lessor*], his heirs, or assigns, in writing first obtained for *the purpose; *And also*, that the said [*lessee*], his executors, administrators, or assigns, will, at the expiration or other sooner determination of the said term hereby granted, peaceably and quietly yield up unto the said [*lessor*], his heirs, and assigns, the said hereby demised messuage or dwelling-house, closes, pieces, or parcels of land, wood, and premises, in good and tenantable repair and condition, together with all the fixtures, furniture, and articles specified in the said schedule or inventory hereunder written; *And also*, that the said [*lessor*], his heirs, and assigns,

—Not to convert land to tillage.

—To spread upon the lands the manure that shall arise therefrom.

—Not to assign, demise, or otherwise part with the possession.

—To leave premises at the end of term.

[*472]

Power of entry

shall be at liberty, either with or without workmen or others, twice in every year during the said term hereby granted, at all convenient times in the day, to enter into and upon the said demised premises, in order to view the same and examine the state and condition thereof; And in case the said [*lessor*], his heirs, or assigns, shall find any want of repairs, and shall deliver to the said [*lessee*], his executors, administrators, or assigns, or leave upon the said demised premises a notice in writing, enjoining him or them to repair the said premises, then the said [*lessee*], his executors, administrators, or assigns, shall, within the space of two calendar months after the delivery of such notice, repair the same accordingly: *And further*, that the said [*lessee*], his executors, administrators, or assigns, will not, during the said term hereby granted, use or employ the said demised premises, or any part thereof, or permit or suffer the same to be used or employed, for the purposes of any trade or business whatsoever: PROVIDED ALWAYS, *and these presents are upon this express condition*, that if it shall happen that the said yearly rents, or any of them, hereby reserved, or any part thereof respectively, shall be in arrear for the space of thirty days next after either of the days hereinbefore appointed for payment thereof, (being first lawfully demanded upon or at any time after the said thirty days, and not paid when demanded); or in case default shall be made in the observance or performance of any of the covenants or agreements hereinbefore contained on the part of the said [*lessee*], his executors, administrators, or assigns, to be observed and performed, then, in either of the said cases, it shall be lawful for the said [*lessor*], his heirs, or assigns, to re-enter into the said de-
*mised premises, or any part thereof in the name of the [*473]
whole, and to re-possess and enjoy the same as in his or their former estate; and upon such entry the said term hereby granted shall cease, determine, and be absolutely void, to all intents and purposes whatsoever. AND the said [*lessor*], for himself, his heirs, executors, administrators, and assigns, hereby covenants and agrees with the said [*lessee*], his executors, administrators, and assigns, that the said [*lessor*], his heirs, executors, administrators, or assigns, will discharge and pay all taxes, assessments,

MANSION-HOUSE, FURNITURE, GARDEN, AND PLEASURE-GROUNDS.

to inspect repairs.

Power of entry on non-payment of rent or breach of covenant.

Covenant by lessor to pay taxes;

MANSION-HOUSE, FURNITURE, GARDEN, AND PLEASURE-GROUNDS.

and other impositions whatsoever, which now are or shall at any time or times hereafter during the said term hereby granted, be taxed, charged, or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or will from time to time allow the said [*lessee*], his executors, administrators, and assigns, to deduct and retain the amount of such taxes, assessments, and impositions, out of the rent which shall have become payable by him or them in respect of the same premises, by virtue of these presents, whether such taxes, assessments, and impositions shall have accrued and become payable for or in respect of and within the same period as the rent out of which the same shall be deducted or not (*d*). *And also*, that it shall be lawful for the said [*lessee*], his executors, administrators, and assigns, (he or they paying the said yearly rents hereby reserved, and observing and performing the several covenants, conditions, and agreements herein contained on his or their part to be respectively paid, observed, and performed), peaceably and quietly to hold, occupy, and enjoy the said messuage or dwelling-house, land, wood, and premises hereby demised, or intended so to be, and every part thereof, during the said term of years, without any eviction, interruption, or denial whatsoever, from or by the said [*lessor*], his heirs or assigns, or any other person or [*474] persons whomsoever, [lawfully claiming or to claim *from, through, under, or in trust for him or them (*e*)]. IN WITNESS, &c.

or allow the tenant to deduct them out of the rent.

For quiet enjoyment.

THE SCHEDULE to which the preceding indenture refers.

(*d*) The necessity of this clause is suggested by the cases stated, *ante*, p. 397.

(*e*) If the covenant is intended to be general, the words within the brackets should be omitted. See a suggestion in regard to these covenants, *ante*, p. 371.

LEASE *by the Dean and Chapter of a Cathedral (a), for Years.*

BY DEAN AND CHAPTER, FOR YEARS.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—; BETWEEN the Dean and Chapter of the Cathedral of ——, in ——, of the one part; and [*lessee*], of &c., of the other part: WITNESSETH, that the said Dean and Chapter, as well for and in consideration of the surrender of a lease of the premises hereby again demised, before this time made and granted by them, the said Dean and Chapter, to [*former lessee*], which lease bears date the —— day of ——, 18—; *as also* for divers other good causes and considerations them hereunto moving, *Have*, with their common assent and consent, demised, granted, and to farm letten, *And* by these presents, for them and their successors, *do* demise, grant, and to farm let unto the said [*lessee*], ALL THAT piece or parcel of ground, containing by estimation two acres, being parcel of a larger piece of ground, called the ——, situate, lying, and being, &c.; TOGETHER with all and every the several messuages, or tenements, out-buildings, yards, gardens, orchards, waters, water-courses, drains, sewers, easements, profits, privileges, commodities, and appurtenances whatsoever, standing and being upon the same, and thereunto belonging as part, parcel, or member thereof; that is to say, ALL THAT messuage or tenement, &c.; AND ALSO ALL *THAT messuage or tenement, &c., *All* which said piece or parcel of land, messuages, tenements, and premises above described, are part of the premises comprised in the lease formerly granted by the said Dean and Chapter to ——, deceased: TO HAVE AND TO HOLD the said piece or parcel of ground, messuages, or tenements, and all and singular other the premises, with their and every of their appurtenances, unto the said [*lessee*], his executors, administrators, and assigns, from the feast of the Nativity of Saint

Parties.

Testatum, lessors, in consideration of surrender of former lease,

Demise.

Parcels.

General words.

Particular description of houses, &c.

[*475]

Habendum for eighteen years.

(a) As to leases by a Dean and Chapter, *vide ante*, Vol. I. p. 64.

BY DEAN AND CHAPTER, FOR YEARS.

Reddendum, 10*l.* payable half-yearly.

John the Baptist, last past before the date hereof, unto the full end and term of eighteen years thence next ensuing, and fully to be complete and ended: YIELDING AND PAYING therefore yearly, and every year, during the said term, to the said Dean and Chapter, and their successors, at or in the treasury house of the said church, the sum of 10*l.* of good and lawful money of Great Britain, at the feast of St. Michael the Archangel, and the Annunciation of the blessed Virgin Mary, by even portions, to be paid without any demand to be made for the same, free and clear of all manner of taxes, sesses, scots, lots, and other impositions, ordinary and extraordinary, whatsoever, to be laid or imposed upon the premises (*a*). AND THE SAID [*lessee*], for himself, his executors, administrators, and assigns, doth covenant and grant with and to the said Dean and Chapter, and their successors, by these presents, that he the said [*lessee*], his executors, administrators, and assigns, the said messuages or tenements, buildings, and premises, and the hedges, fences, walls, sewers, and other inclosures of the premises, from time to time, as often as need shall require, during the said term, shall and will well and sufficiently repair, sustain, maintain, and amend; AND the same, well and sufficiently repaired and amended, to the hands of the said Dean and Chapter, and their successors, at the end of the said term, shall leave and yield up; AND ALSO, that he the said [*lessee*], his executors, administrators, or assigns, shall and will make, or cause to be made, two true and perfect *terriers*, distinctly written on parchment, containing in them, and either of them, the certainty and quantity of the said [*476] *piece or parcel of land, messuages, or tenements, and premises, and of every part and parcel thereof, and the true limits and bounds of the same, as they be severally situate, lying, and being: AND the same *terriers* so made and written deliver, or cause to be delivered, to the said Dean and Chapter, and their successors, in manner and form following, that is to say, the first *terrier* in the first year of the said term; and the second *terrier* in the tenth

Covenant by lessee, to repair demised premises.

and the same so repaired, at the end of the term, to leave;

and make two terriers descriptive of the premises:

and deliver same to the Dean and Chapter,

the first to be made in first year of term;

the second in

(*a*) A further *reddendum* is frequently made of the land-tax under the provisions contained in the land-tax acts; which see *ante*, Vol. 3, p. 409, 2nd edit.

BY DEAN AND CHAPTER, FOR YEARS.

year of the said term; And if it happen that the said yearly rent or farm of 10*l.*, or any part thereof, be behind and unpaid by the space of twenty-one days next after any of the said feasts on which it ought to be paid, so as aforesaid; *Or* if the reparations of the said messuages or tenements, and premises, hedges, ditches, fences, sewers, and other inclosures, be not well and sufficiently made, sustained, and kept within the space of twenty-six weeks next after reasonable monition and warning to the said [*lessee*], his executors, administrators, or assigns, or to the then occupier or occupiers of the premises, by the receiver general, surveyor, or auditor of the said Dean and Chapter for the time being, given and declared: *Or* if any person or persons to whose use and possession this present lease and term of years, or any part thereof, shall remain and come by bargain, sale, legacy, or otherwise, by or from the said [*lessee*], do not within one whole year next after having and enjoying this present lease, make surrender of the same, and of the term of years therein then to come, to the said Dean and Chapter, and their successors, so that he or they may then, or within convenient time after, receive of the said Dean and Chapter, and their successors, another like lawful new lease of all the premises, for so many years as shall be then to come of the term aforesaid, paying only therefore the ordinary charges and fees for sealing and writing the same; *Then*, and thenceforth, this present indenture and lease, and every clause and article therein above on the behalf of the said Dean and Chapter, and their successors, made and granted, shall be utterly void and of none effect (*b*), *any thing aforesaid to the contrary notwithstanding. In witness whereof, to the one part of this indenture remaining with the said [*lessee*], the said Dean and Chapter have set their common seal; and to the other part remaining with the said Dean and Chapter, the said [*lessee*]

tenth year of term.

Condition making lease void if rent be unpaid twenty-one days,

or if reparations be not made within twenty-six weeks after monition;

or if the person to whom this lease shall come from the lessee, do not, within one year, make a surrender and have a new lease.

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Testimonium of a lease by a Dean and Chapter.

(*b*) The reader should be reminded that there is now no material difference between declaring the lease to be void in these terms and giving the lessor a right of entry, the lease being, in the former case, void only at the option of the lessor, and it should seem capable of being confirmed by acceptance of rent, *vide ante*, p. 360.

BY DEAN AND CHAPTER, FOR YEARS.

hath set his hand and seal; DATED (*c*) in the chapter-house of the said Dean and Chapter, the day and year first above written (*d*).

(*c*) Or *Yeoven*, which is the word more frequently used in these cases, being derived from *Theaven*, the Saxon word for *given*.

(*d*) As to leases by Ecclesiastical Corporations, *vide ante*, Vol. I. p. 64.

[478]

RENEWABLE LEASE FOR LIVES.

LEASE *for* LIVES, *with* COVENANT *for* RENEWAL, *at the dropping of the first Life, on Payment of a Fine*—Reddendum *of Proportion of Rent for the possible fractional Period of a Quarter—(Form of Covenant for Renewal in Lease for Years, in Note).*

Parties.

Recital of former lease, with covenant for renewal.

THIS INDENTURE, made the —— day of ——, BETWEEN [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part: WHEREAS, by an indenture of lease, bearing date the —— day of ——, (with a memorandum of livery of seisin indorsed thereon), made between the said [*lessor*] of the one part, and the said [*lessee*] of the other part, the said [*lessor*] demised unto the said [*lessee*], his heirs and assigns, the messuage or tenement and premises hereinafter described, for the natural lives of [*cestuis que vie*], of &c., and the lives and life of the survivors and survivor of them, at and under the yearly rent of £——, payable quarterly: And in the said indenture of lease was contained a covenant on the part of the said [*lessor*], his heirs and assigns, that upon the decease of either of the said [*cestuis que vie*], he the said [*lessor*], his heirs or assigns, would, at the request of the said [*lessee*], his heirs, or assigns, and upon the surrender of the said lease, and the payment of the sum of £——, by way of fine, execute a new lease or new leases of the said premises to the said [*lessee*], his heirs or assigns, at and

RENEWABLE LEASE FOR LIVES.

under the same yearly rent, and with and subject to such and the same covenants, provisoes, and agreements, (including the covenant now in recital), as were reserved and contained in the said recited lease. And whereas the said [*deceased cestui que vie*], one of the *cestuis que vie* named in the said indenture of lease, departed this life on or about the —— day of —— last past, and the said [*lessee*] hath accordingly called upon the said [*lessor*] to *grant him a renewed lease in pursuance of his said covenant, for the life of [*new cestui que vie*], now of the age of —— years, or thereabouts, in the room of the said [*deceased cestui que vie*] deceased. And whereas, by a deed poll under the hand and seal of the said [*lessee*], bearing even date herewith, the said [*lessee*] hath surrendered and yielded up unto the said [*lessor*], and his heirs, All and singular the said messuage and premises, to the intent that the said [*lessor*] may grant a new lease to him thereof, during the lives of the [*surviving cestuis que vie*] and the said [*new cestui que vie*] respectively, as hereinafter is mentioned. Now this indenture witnesseth, that in pursuance of the said recited covenant, and of the said deed-poll or surrender, and also in consideration of the sum of £ ——, of lawful money of the United Kingdom (*a*), to the said [*lessor*] in hand paid by the said [*lessee*], at or immediately before the execution of these presents, the receipt whereof the said [*lessor*] doth hereby acknowledge, and from the same and every part thereof doth hereby acquit, release, and discharge the said [*lessee*], his heirs, executors, administrators and assigns, *He* the said [*lessor*] [*Hath* granted, demised, and leased, and by these presents] *Doth* grant, demise, and lease unto the said [*lessee*], his heirs, and assigns, All that messuage, &c. (*describe parcels*), To have and to hold the said messuage, &c. and all and singular other the premises hereby demised unto the said [*lessee*], his heirs, and as-

—Death of one of the *cestuis que vie*.

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Surrender.

Testatum.

Demise in consideration of surrender of former lease, and premium.

Habendum for three lives.

(*a*) Here it may be observed, that as the currency of Ireland is now assimilated to that of England, all reference to the English currency should be omitted.

RENEWABLE LEASE FOR LIVES.

signs (*b*), from the date of these presents, during the natural lives of the said [*three cestuis que vie*] and the natural lives and life of the survivors and survivor of them (*c*): YIELDING AND PAYING therefore yearly and every year, during the said demise, unto the said [*lessor*], his heirs, or assigns, the yearly rent or sum of £ ——, by equal quarterly payments, on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, in every year, free and clear of and from all present and future taxes, rates, assessments, deductions, and abatements whatsoever, the first payment thereof to be made on the —— day of —— next ensuing, (if the said [*cestuis que vie*], or any or either of them, shall be then

Reddendum.

(*b*) If it be a lease for years, determinable with lives, say—

"his executors, administrators, or assigns."

A lease *pur auter vie* may be granted to either class of representatives, who thereby become special occupants. It is in general rather more convenient to limit it to the personal representatives. See some points respecting this species of interest, 1 Jarm. Powell on Devises, 36, 37, n. Whether a lease *pur auter vie*, once granted to a person, his heirs, and assigns, or his executors, administrators, or assigns, is susceptible of a different modification by a subsequent conveyance of the estate thus created, is a point upon which it seems a difference of opinion is entertained in the profession. There is great difficulty in maintaining, that the estate receives, at its creation, a character incapable of being controlled by any subsequent limitation of it. Lord *Eldon*, in *Milner* v. Lord *Harewood*, 18 Ves. 474, evidently assumes that no such quality is imparted. The question may be avoided by making the limitation in the conveyance correspond with that of the lease.

(*c*) If it be a lease for years, determinable with lives, say—

Variation where the lease is for years.

"for and during the term of ninety-nine years thence next ensuing, if [*cestuis que vie*] *or any or either of them* shall so long live."

Where lease determines on the decease of *either* of the lives.

Without the words in italics the lease would determine on the decease of *either* of the lives; for it should be noticed, as a distinction useful to be kept in view, that a lease absolutely, or for a term, *if certain persons so long live*, operates as a lease for their concurrent lives only, whereas a lease *for the lives of certain persons* subsists until the decease of the survivor. See *Brudnel's case*, 5 Rep. 9.

RENEWABLE LEASE FOR LIVES.

living); and YIELDING AND PAYING for any fractional period of a quarter that may happen to elapse, between the commencement of this present demise, or any one of the days of payment hereinbefore named, and the decease of the last survivor of them the said [*cestuis que vie*], a proportion or rateable share of the said yearly rent, according to the length or duration of such period. (*Add covenant by lessee to pay the rents, ut post*, p. 488, *and keep demised premises in repair*). AND the said [*lessor*] doth hereby, for himself, his heirs, executors, and administrators, covenant, grant, and agree with and to the said [*lessee*], his heirs, and assigns (*d*), that in case the said [*lessee*], his heirs, or assigns (*d*) shall, upon the decease of either of them the said [*cestuis que vie*], be desirous of taking a further or renewed lease in the said demised premises for another life, and shall, as hereinafter more particularly mentioned, within the space of three calendar months next after such decease, give notice in writing of such desire unto the said [*lessor*], his heirs, or assigns, and shall nominate any person in the room or stead of the *cestui que vie* who shall have so departed this life, he the said [*lessor*], his heirs, or assigns, shall and will, at the request, and at the costs and charges of the said [*lessee*], his heirs or assigns (*d*), and on the surrender of this present lease (such surrender to be at the like costs and charges), and payment of the sum of £——, by way of fine or premium for such renewal, forthwith duly make and execute unto him the said [*lessee*], his heirs or assigns (*d*), a new and further lease of all and singular the premises hereinbefore demised, for and during the natural life of the person so to be nominated, and the lives of such of the said [*cestuis que vie*] hereinbefore named, as shall be then living, and of the survivors and survivor of them, at and under the same yearly rent, and with and subject to such and the same covenants, provisoes, and agreements, including this present covenant (*e*), as are herein contained: AND FURTHER,

Reddendum for fraction of a quarter.

[*481]

Covenant by lessor to renew at the dropping of a life;

On surrender of present lease, and payment of a fine.

Provision for the

(*d*) *Or*, "his executors, administrators, or assigns," in case the lease be granted to them.

(*e*) The effect of these words is to make the covenant for renewal per-

RENEWABLE LEASE FOR LIVES.

event of another life dropping within the period of renewal.

that if, within the said period of three calendar months after the decease of any one of them the said [*cestuis que vie*], and before any renewed lease or leases shall have been granted of the said demised premises by virtue of the covenant hereinbefore contained, any other or others of the said [*cestuis que vie*] shall depart this life, then it shall be lawful for the said [*lessee*], his heirs, or assigns (*f*), if he or they shall think proper, to add or insert another life or lives in the lease so to be granted as aforesaid, in the room of the life or lives which shall so drop, he or they paying unto the said [*lessor*], his heirs, or assigns, within the said period of three calendar months after the dropping of the first life, the further sum of £——, in respect of the said life, or each of the said lives, as the case may be, which shall be so inserted in the said lease, it being the intention of the said parties, that the said [*lessee*], his heirs, or assigns (*f*), shall not be obliged, unless he or they shall think proper, provided he renews within the period aforesaid, to incur the expense of a further or additional lease or leases, in respect of the said second and third lives dropping as aforesaid: PROVIDED NEVERTHELESS (*g*), and it is hereby declared, that in case the said [*lessee*], his heirs, or assigns (*h*), shall neglect or refuse, within the space of three calendar months next after the decease of such one of them the said

In case of neglect to renew within the prescribed period, right of renewal to lapse.

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petual, and the consequence of omitting them would be, that no such covenant would be inserted in the new lease, *vide ante*, p. 373. Where it is intended, however, that the renewed lease shall not contain a covenant for renewal, it is better to say—

"except this present covenant,"

in order to prevent the possibility of mistake.

(*f*) *Or*, "executors, administrators, or assigns."

(*g*) This proviso has no operation beyond that of more explicitly declaring the steps to be taken by the lessee; for, in the absence of such a declaration, a lessee who neglects to renew within the prescribed period irrecoverably forfeits his right, (*vide ante*, p. 374). So much misapprehension, however, has existed upon this point, that a clause to this effect may be useful, as opening the eyes of the parties to their actual situation.

(*h*) *Or*, "his executors, administrators, or assigns."

[*cestuis que vie*] as shall first die, to give unto the said [*lessor*], his heirs, or assigns, or leave for him or them at his or their dwelling or respective dwellings, notice in writing of his or their desire to renew the said lease, naming one or more person or persons in the room of him or them who shall have departed this life, or shall neglect to pay such fine as aforesaid forthwith after the expiration of such notice, or to execute a surrender of this present lease, or a counterpart of the said lease so to be granted, at and under the rent, and with the covenants, provisoes, and agreements hereinbefore contained, (including the said covenant for renewal), according to the true intent and meaning of these presents, then and in such case all right and benefit of renewal, by virtue of the said covenant hereinbefore contained, shall lapse and determine, as effectually as if the said covenant had not been inserted in this indenture, any thing herein contained to the contrary thereof in anywise notwithstanding (*i*) (*k*). In witness, &c.

RENEWABLE LEASE FOR LIVES.

(*i*) Add power of attorney to deliver or receive seisin, or both, as the case may be, for which see form, *ante*, p. 135, 136. Also, indorse memorandum of livery, *ut ante*, p. 131 or 136.

(*k*) As to the construction of these covenants for renewal, *vide ante*, p. 372. Where it is intended that the lease shall be renewable within a given period after the dropping of the first life only, it is better explicitly to declare it, avoiding the use of the words "any or either," which have given rise to so much litigation in regard to the construction of covenants to renew, though it is now well settled that in general these words do not extend the right of renewal to the period of the death of the second life, unless that event happen within the prescribed period after the death of the first. The ordinary form of a covenant for renewal in a lease for *years*, is as follows:—

Covenant for renewal in lease for years.

"And the said [*lessor*] doth hereby, for himself, his heirs, and assigns, further covenant, promise, and agree to and with the said [*lessee*], his executors, administrators, and assigns, that in case the said [*lessee*], his executors, administrators, or assigns, shall be desirous of taking a new lease of the said premises hereby demised, after the expiration of the said term hereby granted, and shall, at least six calendar months before the expiration thereof, signify such his or their desire, by a notice in writing, to

RENEWABLE LEASE FOR LIVES.

be delivered unto the said [*lessor*], his heirs, or assigns, or left at his or their usual place or places of abode, he the said [*lessor*], his heirs, or assigns, shall and will, at or before the expiration of the said term, at the costs and charges of the said [*lessee*], his executors, administrators, or assigns, and on payment of the sum of £——, by way of premium or fine for such renewal, forthwith make and execute unto him and them a new and fresh lease of all and singular the premises hereinbefore demised, for a similar term of —— years, to commence from and after the expiration of the present term hereby granted, at and under the like rent, and with and subject to the like covenants, provisoes, and agreements, as are herein contained, *excepting only this present covenant or agreement for renewal*," *&c.*

If the covenant is meant to extend to perpetual renewal, then, instead of the words in italics, say—

" including this present covenant or agreement for renewal."

Infants, lunatics, and *femes covert*, enabled to surrender leases, in order to their being renewed.

By stat. 29 Geo. 2, c. 31, infants, lunatics, (or persons appointed on their behalf), and *femes covert*, are enabled, on a summary application, by petition to the Courts of Chancery or Exchequer, or the Courts of Equity of the Counties Palatine, to surrender leases for lives or years, in order to obtain a renewal, and to accept the renewed leases. And the fines paid for such renewal, with interest, are to be paid out of the estate of the infant or lunatic, or be a charge upon the premises, as the Court shall direct; but as to *femes covert*, the fine, with interest, to be, at all events, an incumbrance upon the demised property.

UNDER-LEASE, *by a Person holding under a* RENEWABLE LEASE, *comprising other Property, to* TWO LESSEES, *for Ten Years and Three Quarters, wanting* TWO DAYS. *Special* RESERVATION *of Rent for the* THREE QUARTERS WANTING TWO DAYS. *(Variation where a nominal Rent only is reserved).* JOINT *and* SEVERAL COVENANT *by* LESSEES, *to* PULL DOWN OLD BUILDINGS, *and* EXPEND *a certain* SUM *in* NEW BUILDINGS *and* IMPROVEMENTS, *conformably to a Plan—to keep the demised Premises, with the* IMPROVEMENTS, *in* REPAIR *—to* PAY *a certain Sum to the Lessor, on his (the Lessee's)* ASSIGNING *or* UNDER-LETTING, *&c.* COVENANT *by* LESSOR *to* PAY *the* RENT *and* PERFORM *the* COVENANTS *of the* ORIGINAL LEASE, *and* INDEMNIFY *the* LESSEE *therefrom; —*LESSEE *to be entitled to* DEDUCT *out of his* RENT *any* PAYMENTS *he may be called upon to make;—*POWER *of* DISTRESS *on the Lessor's* OTHER PROPERTY, *by way of further* INDEMNITY. COVENANT *by* LESSOR *to* PROCURE RENEWAL *of* ORIGINAL LEASE, *and to* GRANT *an* UNDER-LEASE *to the present Lessee, on such* RENEWAL; *but* UNDER-LESSEE *to be at Liberty to* OBTAIN *a* LEASE IMMEDIATELY *from the* SUPERIOR LANDLORD.—*Covenant by Lessor to* PRODUCE *original* LEASE.

UNDER-LEASE, WITH SPECIAL PROVISIONS FOR THE INDEMNITY OF THE LESSEES, AND AS TO RENEWAL, &c.

THIS INDENTURE, made &c., 18—; BETWEEN [*lessor*], of &c., of the one part; and [*lessees*], of &c., of the other part; WITNESSETH, that in consideration of the yearly rent hereby reserved, and of the covenants, conditions, and agreements herein contained on the part of the said [*lessees*], their executors, administrators, and assigns,

Parties.

Testatum.

UNDER-LEASE, WITH SPECIAL PROVISIONS FOR THE INDEMNITY OF THE LESSEES, AND AS TO RENEWAL, &c.

to be respectively paid, observed, and performed, the said [*lessor*] *Hath* granted, demised, and leased, and by these presents *Doth* grant, demise, and lease unto the said [*lessees*], their executors, administrators, and assigns, ALL THAT piece or parcel of ground, situate on the west side of —— street, in the parish of —— aforesaid, and intended to form the north-east corner of a new street, called —— street, *Together* with the messuages or tenements and buildings now standing or being upon the said piece or parcel of ground, and which are intended to be pulled down. *And also* all the messuages or tenements and buildings to be erected and built on the scite of the messuages or tenements and buildings to be so pulled down; and which said piece or parcel of ground, with the abuttals and boundaries thereof, is more particularly delineated and described in the plan or ground-plot thereof, drawn in the margin of these presents; And the same, together with other premises, is now held by the said [*lessor*], under or by virtue of a lease granted to him by [*original lessor*], of &c , by indenture, bearing date the 2nd day of July, 1814, for a term of twenty-one years, from the 25th day of March then last, and which indenture contained a covenant on the part of the said [*original lessor*], to grant a renewed lease, at the expiration of the fourteenth year of the said term, for a like term of twenty-one years, and with the like covenant for renewal as is therein contained; together with all paths, passages, lights, easements, water-courses, profits, commodities, advantages, and appurtenances whatsoever to the said piece or parcel of ground and premises belonging or in anywise appertaining: TO HAVE AND TO HOLD the said piece or parcel of ground, and other the premises hereby demised or intended so to be, with their appurtenances, unto the said [*lessees*], their executors, administrators, and assigns, from the 24th day of June now last past, for the full term of ten years and three-quarters of another year, wanting two days (*a*): YIELDING AND PAYING therefore yearly, and every year, during the said

Parcels.

Messuages, &c. to be pulled down.

General words.

Habendum.

Reddendum.

(*a*) This leaves a reversion of two days in the present lessor.

term hereby granted, except the last three quarters of a year wanting two days, unto the said [*lessee*], his executors, administrators, and assigns, the rent or sum of 20*l.* of lawful British money, in even portions quarterly, on the 29th day of September, the 25th day of December, the 25th day of March, and the 24th day of June in every year, clear of all deductions for taxes or on any other account; the first of such quarterly payments to be made on the 29th day of the present month of September: And also YIELDING AND PAYING (*b*) for the last

UNDER-LEASE, WITH SPECIAL PROVISIONS FOR THE INDEMNITY OF THE LESSEES, AND AS TO RENEWAL, &c.

Reddendum for the three quarters of a year wanting two days.

(*b*) Under the former *reddendum* no rent would have been payable for the last quarter wanting two days, and it is not clear that the same principle would not have extended to the two preceding quarters; for the reservation being "yearly," it has been thought by some learned persons, that no rent accrues for a period less than an entire year; hence the necessity of the additional *reddendum* in the present case.

It frequently happens, that persons having renewable leases, and who are desirous of selling a portion of the demised property, instead of *assigning* such portion to a purchaser, grant an under-lease, for a premium, at a nominal rent, leaving in themselves (as in this case) a bare reversion of a few days only, and by this means the right of renewal is preserved; for it is to be observed, that in most cases the renewal being required to be preceded by a surrender of the existing lease, if the lessee *assigned* any portion of the property, he would place it out of his power to make such surrender, without the concurrence of the assignee; whereas the granting of an under-lease has not this effect, since the stat. 4 Geo. 2, c. 28, s. 6, makes good the surrender of an original lease, in order to its being renewed, *without the junction of the under-lessees;* the statute providing, that the person taking the renewed lease shall have the same remedies against the under-lessees as if the original lease had been kept on foot; and the chief landlords the same remedy by distress against the under-tenants for the rent reserved by the new leases, *to the extent of the rent reserved in the surrendered lease,* as they had before. Where an under-lease is granted at a nominal rent, as before suggested, the terms of the *reddendum* should be—

Concurrence of under-lessees not necessary in surrender for the purpose of renewal.

"YIELDING AND PAYING, therefore, yearly, during the said term, the rent of a pepper-corn, if the same be lawfully demanded."

In such a case, as the lessor retains no substantial interest in the premises, he has no occasion for any covenants on the part of the lessee, farther than

UNDER-LEASE, WITH SPECIAL PROVISIONS FOR THE INDEMNITY OF THE LESSEES, AND AS TO RENEWAL, &c.

three quarters of a year wanting two days, of the said term, the rent or sum of 14*l.* 17*s.* 6*d.*, to be payable, clear of all deductions as aforesaid, on the days and in the manner hereinafter mentioned; that is to say, the sum of 10*l.* by two equal payments on the 29th day of September, and the 25th day of December next preceding the expiration of the said term, and the remaining sum of 4*l.* 17*s.* 6*d.* on the last day but one of the said term hereby granted. AND the said [*lessees*] for themselves, their heirs, executors, administrators, and assigns hereby covenant and agree, and each of them, for himself, his heirs, executors, administrators, and assigns hereby covenants and agrees with the said [*lessor*], his executors, administrators, and assigns, That the said [*lessees*], their executors, administrators, or assigns will, during the continuance of the term hereby granted, pay, or cause to be paid unto the said [*lessor*], his executors, administrators, or assigns, the said yearly and other rents hereby reserved, at the times and in manner hereinbefore appointed for payment thereof respectively, clear of all deductions as aforesaid; *And also*, that the said [*lessees*], their executors, administrators, or assigns will pay and discharge the land and sewer taxes, and all other taxes, rates, assessments, and impositions whatsoever, now taxed, rated, assessed, charged, or imposed, or which at any time or times hereafter, during the continuance of this demise, shall be taxed, rated, assessed, charged, or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof. *And also*, that the said [*lessees*], their executors, administrators, or assigns will, within the space of two years from the day of the date of these presents, lay out and expend in making substantial new erections, buildings, and improvements upon the premises hereby demised, the full sum of 600*l.* of lawful British money (they being at liberty for that purpose, and hereby undertaking to pull down and remove the

By two equal payments.

Joint and several covenant to pay rents,

And taxes.

Within two years to expend 600*l.* in substantial improvements.

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to secure the performance of the covenants in the original lease. His own covenants will be the same, except as to that which respects the deduction of the original rent out of the sub-rent, if paid by the under-lessee (*vide post*, p. 492), which of course will not apply.

UNDER-LEASE, WITH SPECIAL PROVISIONS FOR THE INDEMNITY OF THE LESSEES, AND AS TO RENEWAL, &c.

messuages and buildings now standing on the said piece or parcel of ground, or any of them), and which new buildings and improvements are to be conformable to the general plan of building agreed upon between the said [*lessor*] and the said [*original lessor*], and to be conducted under the inspection and control of, as well the surveyor of the said [*original lessor*], his heirs or assigns, as the surveyor of the said [*lessor*], his executors, administrators, or assigns, and to be executed and finished to the satisfaction of such respective surveyors; And that the said [*lessees*], their executors, administrators, or assigns, shall or will, within the time aforesaid, produce for the inspection as well of the said [*original lessor*], his heirs, or assigns, as of the said [*lessor*], his executors, administrators, or assigns, or their respective surveyors for the time being, the bills and receipts of the several workmen and tradesmen to be employed in or about such erections and buildings, or such other satisfactory evidence as may reasonably be required, in order to prove that the said sum of 600*l.* shall have been laid out and expended in manner aforesaid; *And also*, that the said [*lessees*], their executors, administrators, or assigns will, at their own expense, during the continuance of the said term hereby granted, in all respects well and sufficiently uphold, preserve, and keep the said demised premises, with all the buildings to be erected and built thereon, in manner aforesaid, and also the walls, fences, drains, sinks, sewers, and appurtenances thereunto belonging in good and tenantable repair and condition: *And also*, that the said [*lessees*], their executors, administrators, or assigns will, at the expiration or other sooner determination of the said term hereby granted, peaceably and quietly yield up unto the said [*lessor*], his executors, administrators, or assigns, the said demised premises, with the buildings to be so erected and built thereon as aforesaid, in good and tenantable repair and condition, together with all such fixtures, fastenings, improvements, and things as at any time or times, during the continuance of this demise, shall be set up or affixed in, upon, or to the said premises, or any part thereof (reasonable use and wear thereof in the meantime only excepted). *And*

According to plan.

To prove expenditure by vouchers.

To keep the buildings to be erected in repair;

And leave same repaired.

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also (covenant to insure against fire, ut ante, p. 432, *or* p. 456 (*c*), *and power for lessor* (*d*) *to enter to examine repairs, and covenant to make repairs accordingly, ut ante*, p. 433) (*e*): *And also*, that in case the said [*lessees*], their

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What are proper provisions in regard to fire.

(*c*) The state of the liability of the landlord and tenant, in the event of the destruction or damage of the demised premises by fire, has been already adverted to. Few points create more discussion and controversy in preparing leases, than the question, as to what is the footing on which the parties ought to stand in regard to this liability; the tenant on the one hand contending, that he ought not to be fixed with the loss arising from a misfortune, against which the utmost care may not secure him, as where the fire is occasioned by the negligence of his servants, or (which is a much stronger case) where it has originated in another house, and been communicated to his premises, and particularly as the landlord, whose beneficial interest in the property is generally so much larger than his own, has the opportunity of insuring—the landlord, on the other hand, insisting, that having parted with the possession, and thereby with all power of preventing fire, he ought to be exempted from all risk; and that the lessee may protect himself from the injury arising from his liability under the covenants by an insurance, and with greater certainty than he (the landlord) has it in his power to do, since any insurance *he* may effect is liable to be invalidated by the act of the lessee, without his knowledge; as by having combustible materials on the premises, erecting stoves, &c. The latter is certainly an important consideration, and affords an argument for throwing at least *some* portion of the risk on the tenant: it suggests too, that a covenant not to do any act to invalidate fire insurances should in all cases be inserted, where the insurance and rebuilding by the lessee are not effectually provided for. See a covenant of this nature, *ante*, p. 438. Upon the principle, that the tenant ought to bear a part of the risk, the suspension of the rent during the period of the premises remaining uninhabitable (*vide* clause *ante*, p. 425), is, and with some reason, generally objected to on the part of the landlord.

(*d*) In under-leases this power is made to extend to the original landlord, where a similar power of entry is reserved to him by his (the original) lease.

(*e*) If the premises are within the bills of mortality, the following covenant may be added—

To repair party walls, where premises are

"*And also*, that the said [*lessees*], their executors, administrators, or assigns shall and will at all times, during

executors, administrators, or assigns shall, at any time or times hereafter, be desirous of making any assignment or assignments, under-lease or under-leases, or other disposition of the said premises, or any part or parts thereof, for the whole or any part of the said term hereby granted, Then the said [*lessees*], their executors, administrators, or assigns shall, previously to the making or executing any and every assignment, to be at any time or from time to time made, of the whole of the said premises, for the whole of the said term hereby granted, pay or cause to be paid to the said [*lessor*], his executors, administrators, or assigns, a sum equal to a moiety of the amount of one year's rent hereby reserved, by way of fine, and shall, previously to the execution of any and every assignment, to be at any time or from time to time made, of any part less than the whole of the said premises, for the whole of the said term hereby granted, pay or cause to be paid to the said [*lessor*], his executors, administrators, or assigns, the sum of 5*l.* of lawful British money, by way of fine, and shall, previously to the making or executing of any and every under-lease, or other disposition, to be at any time or from time to time made of the whole or any part of the said premises, for any part less than the whole of the said term hereby granted, pay or cause to be paid unto the said [*lessor*], his executors, administrators, or assigns, a sum equal to one moiety of one year's rent intended to be reserved on such under-lease or disposition, if such rent shall exceed the sum

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To pay a fine to the lessor on assigning or under-letting.

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this demise, pay all such costs, damages, penalties, and expenses as may be incurred by reason of any party wall, or party walls, or party partitions, of or belonging, or which shall belong to the premises hereby demised, being taken down and rebuilt under or by force of the act of Parliament passed in the 14th year of the reign of his late Majesty, or any other act or acts made or to be made for regulating buildings and party walls, and preventing mischiefs by fire within the weekly bills of mortality, and shall and will indemnify and save harmless the said [*lessor*], his heirs, executors, administrators, and assigns of and from all such costs, damages, penalties, and expenses."

within the bills of mortality.

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of 10*l.*; but if such rent shall be nominal only, or shall be less than the yearly sum of 10*l.*, then the sum of 5*l.* by way of fine: *And that*, in case any question, controversy, or dispute shall arise, during the said term, between the said [*lessees*], their executors, administrators, or assigns, or any other tenant and tenants, under-tenant or under-tenants of the said [*original landlord*], his heirs or assigns, occupying premises near or adjoining to the said premises hereby demised, concerning any light, water-course, annoyance, or other matter or thing relating to the said demised premises, then and so often as the same shall happen, the said [*lessees*], their executors, administrators, or assigns, shall submit to and abide by such award or determination as the said [*original lessor*], his heirs or assigns shall make or declare, in writing, concerning every such question, controversy, or dispute: PROVIDED ALWAYS, and these presents are upon this condition, that if it shall happen that the said yearly and other rents hereinbefore reserved, or any or either of them, or any part thereof respectively shall be in arrear or unpaid, in the whole or in part, for the space of twenty-one days (*Power of entry, ut ante*, p. 423). AND the said [*lessor*] for himself, his heirs, executors, and administrators, hereby covenants and agrees with the said [*lessees*], their executors, administrators and assigns, That the said [*lessor*], his executors, administrators, or assigns will duly pay or cause to be paid the yearly rent reserved by the said lease so granted to him by the said [*original lessor*] as aforesaid, and observe and perform the covenants, conditions, and agreements therein contained on the part of the said [*lessor*], his executors, administrators, and assigns to be observed and performed; and will keep the said [*lessees*], their executors, administrators, and assigns indemnified against the payment of the same rent, and the performance of the same covenants, conditions, and agreements, except so far as such covenants, conditions, and agreements are conformable to the covenants, conditions, and agreements hereinbefore contained, and ought to be observed and performed by the said [*lessees*], their executors, administrators, and assigns (*f*); *And further*, that it shall be lawful

Disputes to be settled by original lessor.

Power of entry, on non-payment of rents.

Covenant by lessor to pay the rent reserved by the original lease,

And perform the covenants,

And keep the lessees indemnified therefrom.

Lessee may deduct payments made to the original landlord out of the rent.

(*f*) Sometimes in under-leases, particularly where the rent is nominal,

for the said [*lessees*], their executors, administrators, and assigns, from time to time to deduct and retain out of the

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the under-lessee merely covenants to perform all the covenants of the original lease in respect of the premises demised to him; and the under-lessor covenants on his part to perform the covenants in respect of the remainder; but it seems to be more correct, and less likely to lead to misunderstanding, that the under-lessee should expressly enter into the covenants with his own lessor, without reference to the original lease, and the covenant of indemnity of the latter will then extend to all the premises. In preparing under-leases no point more readily suggests itself (though it is not always attended to) than, that the original lease should be examined, in order that the original lessee may take care to bind his sub-lessee, in respect of the premises sub-demised, by all the obligations by which he is himself bound. And it is to be observed, that in such a case, if the under-lessee breaks his covenant, by means of which his lessor is exposed to an action by his own lessor, he (the under-lessor) may recover against the under-lessee, as well the damages and costs recovered against him in such action, as the costs incurred in defending it. *Neale* v. *Wyllie*, 3 Barn. & Cress. 533; *S. C.* 5 Dowl. & Ryl. 442. On the other hand, it behoves the under-lessee on his part to see what are the conditions under which his lessor holds the property; for, by a neglect of this precaution it has sometimes happened, that an under-lessee has exposed himself to forfeiture by the violation of covenants in the original lease, of the existence of which he was ignorant; and he has, we have seen, in such a case, no remedy against his lessor upon the usual limited covenants for quiet enjoyment for the non-disclosure of the condition. *Vide ante*, p. 372.

Cautions to be observed in preparing under-leases.

There being no privity between the original lessee and the under-lessee, it is clear that they cannot bring actions against each other on the covenants contained in the lease and under-lease. *Holford* v. *Hatch*, Doug. 183. An important practical suggestion arising from this doctrine is, that a lessee, who has granted an under-lease, should carefully avoid any act by which his reversionary interest may become merged in the ultimate reversion, the consequence of such act being, that *all his remedies as lessor against the under-lessee, which were incident to such reversion, are destroyed*, and he can neither distrain for the rent reserved by the under-lease, nor bring an action on any of the covenants. Co. Litt. 238. b.; *Lord Treasurer* v. *Barton*, Moor. 94; *Chaworth* v. *Phillips*, Ib. 876; *Webb* v. *Russell*, 3 D. & E. 393; *Stokes* v. *Russell*, Ib. 678. This not unfrequently happens where a lessee purchases the inheritance, and, without first divesting himself of the term, takes a conveyance of the fee

Under-lessor should be careful not to extinguish his mesne reversion.

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rent hereinbefore reserved, any sum or sums of money, which they shall have paid to the said [*original lessor*],

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to himself in the usual manner, by which, of course, his term becomes extinguished. To prevent this consequence, the term or the inheritance should be vested in a trustee.

Tenancy from year to year cannot be determined by the superior landlord by notice.

Upon the principle that the relation of landlord and tenant does not subsist between the original lessor and an under-lessee, it is clear that a sub-tenancy from year to year cannot be determined by the superior landlord, to whom the mesne landlord has surrendered his interest. Thus, in a modern case, where a tenant from year to year sub-let part of the lands to *B.* also from year to year, and *A.* afterwards delivered up possession of the part so let to his landlord, it was held, that as this act of *A.*, even if it was intended as a surrender of the whole, could not affect the interest of the under-lessee (which is a point that merits the observation of the reader), the tenancy of the latter remained undetermined notwithstanding *a notice to quit given to him by and in the name of the superior landlord*, whom he had never recognised as landlord, by payment of rent or otherwise, there being no privity of contract or estate between them; but that such notice ought to have been given by the immediate landlord. *Pleasant* d. *Hayton* v. *Benson*, 14 East, 234. The position, that the notice should have been given by the immediate landlord of the tenant, may seem indeed to clash with the doctrine before adverted to, regarding the extinguishment of his character of landlord by the merger of his interest, since it would appear that, for some purposes at least, his relation of landlord still subsists; but it is to be observed, that the attention of the Court was not drawn to this principle; and as no such notice had been given, the point did not arise. In order with certainty to determine the sub-tenancy in such a case, it is conceived the correct course would be for the superior landlord to give a regular notice to quit to his lessee, and for the latter to give a like notice to his (the under-) lessee; and then, as the original tenancy would at all events be determined, the derivative tenancy must fall with it, and the superior landlord might treat the under-tenant holding over after that period as a trespasser, and recover against him in an action of ejectment; *Roe* v. *Wiggs*, 2 New Rep. 330; and if the derivative tenancy was not expired, this, though it might form a ground of action by the sub-tenant against *his* landlord, could not interfere with the paramount claim of the ulterior owner to the possession. It may be asked, however, if the original tenancy may be determined by notice, so as to enable the landlord to maintain an ejectment against the sub-tenant, why may not the intermediate tenant dispense with the notice, and place the premises in the same situation by a surrender of a

his heirs and assigns, in consequence of any distress or distresses made by him or them upon the said premises hereby demised, for the rent reserved by the said indenture of lease of the 2nd day of July, 1814, or in order to avoid any such distress or distresses from being made, and all costs and expenses which shall have been incurred by the said [*lessees*], their executors, administrators, or assigns, by reason of the non-payment of the said rent by the said [*lessor*], his executors, administrators, or assigns, or by reason of the

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part in the name of the whole? Perhaps there is some difficulty in completely disposing of this objection; but the Judges who decided *Pleasant* v. *Benson* (though they considered that no surrender of the whole had been attempted to be made in that case), expressed an unequivocal opinion, that the sub-tenant would not have been affected by it, upon the ground of Lord *Coke's* doctrine, and such would no doubt be the present determination of the Courts on the subject.

Cases in which a tenant from year to year *sub-lets* are to be distinguished from those in which he *assigns*, where the tenancy of course subsists from the same period, and on the same terms in regard to the assignee, as in regard to the original tenant. *Doe* d. *Castleton* v. *Samuel*, 5 Esp. 172. It was lately held that a demise from year to year, by a person who was himself tenant from year to year, was in legal operation a demise from year to year during the continuance of the original tenancy, and was properly so described in pleading, although, at the time of making the contract, no such qualification was mentioned. *Pyke* v. *Eyre*, 9 B. & C. 909.

What an assignment as distinguished from an under-lease.

It is clear that where the instrument operates as a transfer of the whole residue of the term, though the rent is reserved to the grantor, and not to the original lessor, it is an assignment, and not an under-lease (*a*); *Palmer* v. *Edwards*, Doug. 178, n.; see also *Parmenter* v. *Webber*, 8 Taunt. 593; *S. C.* 2 J. B. Moore, 656, which overrule *Poultney* v. *Holmes*, 1 Str. 405. If the reversion of a single day is left in the grantor, it is attended with the same legal consequences as where he retains a substantial interest. *Holford* v. *Hatch*, Doug. 183. It is to all intents an under-lease, and the same language should be employed in framing the demise as in other cases of leases.

(*a*) In such a case, as there is no reversion in the person to whom the rent is reserved, an express power of distress should be limited to the assignor for securing it; for it is clear that he cannot distrain without such a power. *Preece* v. *Corrie*, 2 Moore & Payne, 57.

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non-performance, by him or them, of any of the covenants contained in the said indenture of lease, and which on his and their part ought to be performed, whether such rent or breach of covenant shall have accrued or occurred within the same period as the rent out of which the said monies shall be deducted, or at any antecedent or other period (*g*); *And also* (*h*), that in case the said [*lessees*], their executors, administrators, or assigns, shall at any time hereafter, during the continuance of this demise, pay or expend any sum or sums of money, costs, and expenses for the purposes and in manner aforesaid, exceeding in amount the rent which shall, for the time being, happen to be then due from them to the said [*lessor*], his executors, administrators, or assigns, it shall be lawful for the said [*lessees*], their executors, administrators, and assigns, to enter into and distrain upon all or any part of the messuages, tenements, lands, and hereditaments, demised to him, the said [*lessor*], in and by the said indenture of lease of the 2nd day of July, 1814, hereinbefore referred to, and not comprised in the present under-lease, for all such and every sum or sums of money, costs, and expenses, as they, the said

Power of distress on lessor's other property, by way of further indemnity.

(*g*) If the lessor has become possessed of the lease by assignment, and especially if such assignment be recent, add—

"or before the said [*lessor*] became possessed of the said indenture of lease hereinbefore referred to, and the premises therein comprised."

As to the necessity of these words, in order to authorize the deduction, *vide ante*, p. 398. The reader will find forms for a covenant of indemnity, and authority to retain rent, somewhat varied in the precedent of a building under-lease, which will be the next but one in order.

As to clause giving power of distress.

(*h*) Where the rent reserved by the original lease is more than the sub-rent, and indeed, where this is not the case, as the former may be in arrear, or the expenses consequent on its non-payment may augment the sum paid by the under-lessee beyond the amount of the sub-rent payable by him, or there may be no rent due on his own lease for nearly half a year after he has made the payment, it seems to be reasonable to arm the under-lessee with this power of distress on the other property comprised in the original lease.

[*lessees*], their executors, administrators, or assigns, shall have so paid or incurred as aforesaid, and the distress and distresses then and there made, to take, lead, drive, carry away and impound, and in pound to detain and keep, and in due time afterwards to sell and dispose of, or otherwise to act therein according to law, in the same manner as in the case of distresses by landlords for rent reserved upon leases for years; *To the intent* that the said [*lessees*], their executors, administrators, or assigns, may be fully satisfied all and every the sum and sums of money, costs, and expenses, they, or any of them, shall have paid or incurred by any of the means aforesaid, as well as the expenses incident to such distress or distresses: *And also, (covenant for quiet enjoyment, ut ante,* p. 435); *And further,* that he the said [*lessor*], his executors, administrators, and assigns, and all and every person and persons whosoever lawfully claiming any legal or equitable estate, right, or interest, by, from, or under him, shall and will, upon the expiration of the fourteenth year of the term of twenty-one years, granted by the said hereinbefore mentioned indenture of the 2nd day of July, 1814, cause and procure a new lease of all and singular the premises comprised in the said indenture of lease to be granted to him or them by the said [*original lessor*], his heirs or assigns, in pursuance of his covenant hereinbefore mentioned, for a term of twenty-one years thenceforth, at the like rent, and with the like covenants and agreements, (including the said covenant for renewal (*i*),) as are contained in the said indenture of the 2nd day of July, 1814; *And also,* that he the said [*lessor*], his executors, administrators, and assigns, and all and every person and persons whosoever, lawfully claiming any legal or equitable estate, right, or interest, by, from or under him or them, shall and will, upon such renewal by the said [*original lessor*], his heirs or assigns, grant and execute to the said [*lessees*], their executors, administrators, or assigns, or unto such other person or persons as

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Covenant by lessor to renew the original lease;

and upon such renewal to grant an under-lease to the present lessees.

(*i*) *Or* "except the said covenant for renewal," as the case may be.

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they shall direct or appoint, an under-lease, or under-leases of all and singular the premises hereby intended to be demised for the whole of the term created by such new or further demise as aforesaid, except the two last days thereof, under and subject to such and the same rent, covenants, provisoes, and agreements, as in these presents are reserved and contained, including this present covenant (*k*), they, the said [*lessees*], their executors, administrators, and assigns, on their part, paying a proportional part of the fines, fees, and other expenses attending such renewal by the said [*lessor*], his executors, administrators, or assigns, with all the expenses of such under-lease or under-leases (*l*), which proportional part, it is hereby agreed, shall be fixed and determined by the improved values to be from time to time set by the [*original lessor*] upon the lands and tenements to be comprised in every such renewed lease, and the amount of the payment so to be made by the said [*lessees*], their executors, administrators, or assigns, upon every such renewal, to be settled and adjusted, in case of dispute concerning the same, by reference to the person who for the time being shall be the surveyor or agent of the said [*original lessor*], his heirs or assigns. PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties here-

Under-lessees to pay proportion of fine, &c.

Lessees to be at liberty to obtain a new lease di-

(*k*) *Or* "except this present covenant," as the case may be.

Question as to the proportion of a fine to be paid by a lessee.

(*l*) In *Charlton* v. *Driver*, 5 J. B. Moore, 59; *S. C.* 2 Brod. & Bing. 345, C. being possessed of a lease of certain premises held under the Archbishop of Canterbury, granted an under-lease of part of the lands to D. and E., who covenanted that they would "from time to time, and at every time during the said term, pay to C., or the said Archbishop, such part of the fine and fees which, upon every renewal by C. of the lease by which he held the premises thereby demised, (among others), should be paid or payable by C. in respect of the premises thereby demised to D. and E." C. afterwards renewed his lease under the Archbishop for a period exceeding, by five years, the term demised to D. and E.; and it was held that D. (who had survived E.) was not liable, upon this covenant, to pay a larger proportion of the fine and fees incurred by C. upon the renewal of his lease, than was commensurate with the interest which he (D.) had acquired in the premises.

to, that it shall be lawful for the said [*lessees*], their executors, administrators, and assigns, at any time hereafter to apply for and procure from the said [*original lessor*], his heirs, or assigns, an original lease to be granted unto them, the said [*lessees*], their executors, administrators, and assigns, of all and singular the premises hereby demised, or intended so to be, for their own use and benefit, and that in such case the said [*lessor*], his executors, administrators, or assigns, shall and will, at the costs and charges of the said [*lessees*], their executors, administrators, or assigns, join and concur in making such surrender of the said premises hereby demised, as they the said [*lessees*], their executors, administrators, and assigns, shall require, and that upon such lease being granted, the covenants and agreements hereinbefore contained on the part of the said [*lessor*], for the renewal of the lease of the said hereby demised premises, and the covenant on the part of the said [*lessees*] to pay a proportionate part of the fine and expenses on every such renewal, shall cease, determine, and be absolutely void, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. *And lastly*, the said [*lessor*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with the said [*lessees*], their executors, administrators, and assigns, that he the said [*lessor*], his heirs, executors, or administrators, shall and will from time to time, during the term hereby granted, upon every reasonable request and notice thereof in writing, for that purpose given to him by the said [*lessees*], their executors, administrators, and assigns, produce and shew forth, or cause and procure to be produced and shewn forth to them, or to such person or persons as they shall desire or require, or at any trial or hearing in any Court of Law or Equity, or other judicature, or in the execution of any commission or elsewhere, as occasion shall be or require, the said indenture of lease of the 2nd day of July, 1814, hereinbefore referred to, unless the said [*lessor*], his heirs, executors, or administrators, shall be prevented or hindered from so doing, by fire or other inevitable accident. In witness, &c.

UNDER-LEASE, WITH SPECIAL PROVISIONS AS TO RENEWAL.

rectly from the original lessor.

Covenant by lessor to produce lease.

BUILDING LEASE UNDER A POWER.

BUILDING LEASE *granted by a (Nobleman who was)* TENANT *for Life under a Settlement, by* VIRTUE *of a* POWER (*a*).—*Covenant by Lessee to* BUILD *a House uniformly with other Houses in the same Street; also to build* OTHER HOUSES *of a certain* CLASS; *and other usual Covenants.—(Form of* COVENANT *by* LESSOR *seised in fee, to join in* UNDER-LEASES *and* ASSIGNMENTS, *in order to apportion the Rent).*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——: BETWEEN the Right Honourable Charles, Earl of ——, of the first part; [*person whose consent is required by the power*] (*b*), of &c., of the second part;

(*a*) As the subject of powers to make leases is fully discussed in Sir E. B. Sugden's admirable Treatise of Powers, which, it may be presumed, is in the possession of almost every person into whose hands the present work will fall, and has also been adverted to by many other respectable writers, the Editor has not entered upon it, conceiving that he should perform a more acceptable duty to his readers, (and certainly a task more pleasing to himself), by devoting the space which would have been thus occupied to those branches of the subject of leases, which have been less successfully explored.

As to leases by trustees seised of the inheritance.

(*b*) Where trustees, in whom the whole legal inheritance is vested for the purposes of sale, or otherwise, are authorized to make leases, (a power which is often found very convenient), a lease executed by them does not differ from any other lease by owners in fee, except that a reference is generally made to their fiduciary character, and to the instrument containing the authority under which they act. (*Vide* precedent, *ante*, p. 451). If the property over which the power of leasing extends, is limited unto or in trust for a person for life, with remainders over, the consent of the tenant for life is frequently required; but if the tenant for life is himself the donee of the power, his discretion is rarely fettered by the necessity of obtaining the consent of any third person, as the

BUILDING LEASE UNDER A POWER.

Testatum.

and [*lessee*], of &c., of the third part: WITNESSETH, that in consideration of the yearly rent, covenants, and agreements hereinafter reserved and contained on the part of the said [*lessee*], his executors, administrators, and assigns to be paid and performed, He the said Earl, by virtue and in pursuance of the power or authority in that behalf given to him by a certain indenture, bearing date the —— day of ——, ——, (being the settlement made on the marriage of the said Earl with the Right Honourable ——, Countess of ——, his late wife, deceased), and of all other powers and authorities enabling him thereunto, and with the consent and approbation of the said [*consenting party*], testified by his being made a party to, and sealing and delivering these presents, *Hath* demised, leased, and set, And by these presents *Doth* demise, lease, and set unto the said [*lessee*], his executors, administrators, and assigns, *(describe piece of ground)*, Together with the messuages or tenements, and all other erections and buildings which at any time hereafter, during the term hereby granted, shall be erected and built on the same piece or parcel of ground hereby demised, or any part thereof: And all cellars, sollars, vaults, areas, ways, paths, passages, lights, easements, waters, water-courses, commodities, and appurtenances whatsoever, to the said hereby demised ground and premises belonging or in anywise appertaining: TO HAVE AND TO HOLD the said piece or parcel of ground, and all and singular other the premises hereby demised, with their appurtenances, unto the said [*lessee*], his executors, administrators, and assigns, from the twenty-fifth day of March now last past, for and during, and unto the full end and term of seventy-two years from thence next ensuing, and fully to be complete and ended: YIELDING AND PAYING therefore, for the first year of the said term, the rent of one pepper-corn, if the same shall be demanded; And YIELDING AND PAYING yearly, and every year, during all the residue of the said term hereby granted unto the said Earl

Lessor, by virtue of power in his marriage settlement,

Demises.

Parcels.

Habendum,

for seventy-two years.

Reddendum of nominal rent for first year.

Further *reddendum* for residue of term.

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author of the limitations usually takes care to impose such requisitions as effectually to prevent the inheritance from being damnified by any exercise of the power, which would not also be detrimental to the estate of the person exercising it. The present form may be adapted to the circumstances of either case.

BUILDING LEASE UNDER A POWER.

and his assigns during his life, and after his decease unto the person or persons entitled for the time being to the said demised premises in reversion immediately expectant on the determination of the aforesaid term, the yearly rent or sum of £——, of lawful money of the united kingdom of Great Britain and Ireland, by equal quartely payments, on the twenty-fourth day of June, the twenty-ninth day of September, the twenty-fifth day of December, and the twenty-fifth day of March in every year, free from all taxes, charges, impositions, and assessments whatsoever, imposed or to be imposed upon or in respect of the said demised premises, or any part thereof, by authority of Parliament or otherwise howsoever; the first quarterly payment of the said yearly rent or sum of £—— to be made on the twenty-fourth day of June, which will be in the year ——. And the said [*lessee*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said [*lessor*] and his assigns, and to and with the person or persons for the time being entitled to the immediate reversion or remainder of or in the premises hereby demised expectant on the term hereby granted, in manner following, (that is to say,) that he the said [*lessee*], his executors, administrators, or assigns, will pay or cause to be paid unto the said Earl and his assigns during his life, and after his decease unto the person or persons entitled for the time being to the said demised premises, in reversion or remainder immediately expectant on the determination of the term hereby granted, the said yearly rent or sum of £——, clear of all taxes and deductions as aforesaid, on the days and times, and in the manner and form, on and in which the same is hereinbefore reserved and made payable; *And also*, that he, the said [*lessee*], his executors, administrators, and assigns, shall and will, during all the said term hereby granted, bear, pay, and discharge all such king's-tax, land-tax, sewers-tax, church-dues, and parish dues, scavengers' wages, and all other taxes and impositions whatsoever, as are or shall be assessed or charged on, or in anywise imposed upon or in respect of the same premises hereby demised, or intended so to be, or any part thereof, by authority of Parliament, or otherwise howsoever: *And also*, that he the said [*lessee*], his executors,

Covenant by lessee to pay rent,

and taxes.

To build house

BUILDING LEASE UNDER A POWER.

administrators, and assigns, shall and will at his and their proper costs and charges, within the space of two years to be computed from the day of the date hereof, in a good, substantial, and workman-like manner, erect, build, and completely finish, fit for habitation and use, upon the front of the piece or parcel of land hereby demised, next —— Street aforesaid, a good and substantial brick messuage or tenement, of the same rate of building, character, and description, in every respect, as, and in an uniform manner with, the messuages or tenements ranging therewith in the same street; *And also* shall and will within the same period, and in like manner, erect, build, and finish upon the front of the same ground next Lower —— Street aforesaid, two good and substantial brick messuages or tenements, not less than fourth rates; and also shall and will erect and build all such erections, buildings, outhouses, and other conveniences as shall be necessary and proper to be used with and for rendering the same messuages or tenements commodious, and in all respects fit for habitation and use, the whole to the satisfaction of the surveyor of the said Earl, or his assigns, or the person or persons to whom the immediate reversion or remainder of the said demised premises shall, for the time being, belong; And also, that he the said [*lessee*], his executors, administrators, and assigns, shall and will (*repair, paint, and deliver up fixtures, ut ante,* pp. 429, 432); *And also*, that it shall be lawful for the said Earl, and his assigns, and for the person and persons to whom the immediate reversion or remainder of the said demised premises shall, for the time being, belong, and any person or persons deputed by him, her, or them, to enter into and upon the premises hereby demised, at any reasonable hours in the day-time, within the last seven years of the aforesaid term of —— years, to take a schedule or inventory of all and every the fixtures and things to be yielded up at the expiration thereof as aforesaid; *And also*, that the said [*lessee*], his executors, administrators, and assigns, shall and will, during the term hereby granted, as often as need shall require, bear, pay, and allow a reasonable share and proportion for and towards the costs and charges of making, supporting, repairing, and amending all or any pavements, channels, fences, and party walls, wydraughts,

within two years.

To be uniform with houses in the same range; also to build two other houses of a certain class.

That lessor may enter during last seven years, to take an inventory of fixtures.

To contribute in common with the other tenants towards repairing pavements, &c.

BUILDING LEASE UNDER A POWER.

sewers, and drains, belonging or which at any time during the said term shall belong to the said demised premises, or any part thereof, in common with other premises near or adjoining thereto; And that such proportion shall be fixed and ascertained by the surveyor of the said Earl, or his assigns, or of the person or persons to whom the immediate reversion or remainder of the said demised premises shall, for the time being, belong, and shall be recoverable in the nature of rent in arrear: *And moreover*, that it shall be lawful for the said Earl, and his assigns, and for the person or persons to whom the immediate reversion or remainder of the said demised premises shall, for the time being, belong, and for any person or persons to be deputed by him, her, or them, with or without workmen or others, in his, her, or their company, twice or oftener in every year during the said term hereby granted, at seasonable and convenient times in the day-time, to enter and come into and upon the said demised premises, or any part thereof, to view the state and condition of the repairs thereof, and of all defects and wants of reparation and amendment, and upon every such view to give or leave notice or warning in writing at the said demised premises: *And that* he the said [*lessee*], his executors, administrators, or assigns, shall and will, within three calendar months next after such notice and warning, well and sufficiently repair and amend the same, according to such notice or warning so given or left as aforesaid: *And moreover*, that it shall be lawful for the workmen of the said Earl, and his assigns, and of the person or persons to whom the immediate reversion or remainder of the said demised premises shall for the time being belong, and his or their tenants or occupiers of the houses adjoining to the said demised premises, at seasonable times in the day-time, to come into or upon the said hereby demised premises, or any part thereof, to repair such adjoining houses, as often as occasion shall require: *And moreover*, that he the said Earl, and his assigns, and the person or persons to whom the immediate reversion or remainder of the said demised premises shall for the time being belong, and his and their tenants, shall have free liberty of water-course in and through the said hereby demised premises, to carry off the water from his, her, or their other houses contiguous or adjoining to the said hereby

Proportion to be fixed by lessor's surveyor.

Power of entry to view repairs.

Covenant by lessee to repair, according to notice.

—That lessor may enter to repair adjoining houses.

And shall have liberty of water-course.

BUILDING LEASE UNDER A POWER.

demised premises; *And that*, if need be, the tenants of such adjoining houses shall be permitted to come into and upon the said hereby demised premises, to enter and clean the privies, cess-pools, gutters, and drains of and belonging to such other houses contiguous to or adjoining the said hereby demised premises: *And further*, that he the said [*lessee*], his executors, administrators, and assigns, shall not nor will exercise or carry on, or permit or suffer to be exercised or carried on by any person whomsoever, upon any part of the premises hereby demised, the trade of a cat-gut spinner, dog-skinner, boiler of horse flesh, slaughter-man, soap-maker, melter of tallow, or any other offensive trade whatsoever, nor do or cause, or wittingly or willingly suffer to be done, any act or thing on the said demised premises, or any part thereof, which may be or grow to the annoyance, damage, or disturbance of the said Earl, or his assigns, or of the person or persons to whom the immediate reversion or remainder of the said demised premises shall for the time being belong, or his, her, or their tenant or tenants: *And moreover*, that he the said [*lessee*], his executors, administrators, and assigns, shall and will insure the buildings to be erected on the ground hereby demised, to the full value of so much thereof as can be destroyed by fire, in one of the public fire insurance offices in London or Westminster, and keep the same so insured during all the aforesaid term; and upon the request of the said Earl, or of his assigns, or the person or persons to whom the immediate reversion or remainder of the said demised premises shall for the time being belong, or his or their steward or agent, shall and will produce and shew forth the receipt for the premium for such insurance for the then current year: *And also* will, during the said term, as often as the buildings to be erected on the ground hereby demised, or any part thereof, shall be burnt down or damaged by fire, forthwith reinstate the same under the direction of the said Earl, or his assigns, or of the person or persons to whom the immediate reversion or remainder of the said demised premises shall, for the time being, belong, and shall and will pay the said hereby reserved rent in the same manner as if no such accident by fire had happened: PROVIDED ALWAYS, that if it shall happen that the said yearly rent or

Other tenants of lessor may enter to clean drains, &c.

Not to exercise offensive trades.

Covenant to insure;

—And rebuild in case of fire.

BUILDING LEASE UNDER A POWER.

sum of —— pounds shall be unpaid, in the whole or in part, by the space of twenty-one days next after the said days of payment on which the same ought to be paid as aforesaid, the same being first lawfully demanded upon or at any time after the expiration of the said twenty-one days, and not paid when demanded; or if default shall be made in the observance or performance of all or any of the covenants, clauses, or agreements herein contained on the part of the said [*lessee*], his executors, administrators, or assigns to be performed, then, and thenceforth, and in any of the said cases, it shall be lawful for the said Earl, or his assigns, and for the person and persons entitled for the time being to the said demised premises in remainder or reversion, immediately expectant on the determination of the aforesaid term, into and upon the said demised premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, re-possess, and re-enjoy, as in his and their first and former estate.

Proviso for re-entry on non-payment of rent or breach of covenants.

Covenant by lessor for quiet enjoyment.

And the said Earl, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree, to and with the said [*lessee*], his executors, administrators, and assigns, that he the said [*lessee*], his executors, administrators, or assigns, paying the said yearly rent of £——, hereby reserved, at the days and in manner hereinbefore appointed for payment thereof, and observing and performing all the covenants, clauses, and agreements in these presents contained on his and their part and behalf to be paid and performed, shall peaceably and quietly have, hold, and enjoy the said hereby demised premises, and every part thereof, with the appurtenances, during the said term of seventy-two years hereby granted, without any interruption, eviction, or denial, from or by him the said Earl, his heirs, executors, administrators, or assigns, or from or by any person or persons lawfully claiming by, from, or under him, or by, from, or under any of his ancestors (*c*). In witness, &c.

(*c*) Where the ground demised for building is to be covered by several houses, which it may be convenient to under-let or assign separately, a covenant is sometimes introduced on the part of the lessor to join

in the under-leases or assignments, in order to exonerate the several parcels thus sub-let or assigned from more than their proportion of the original rent, to the whole of which they would otherwise be liable—a circumstance that of course operates to diminish their value. It may be useful to give the form of such covenant by a lessor seised in fee.

Covenant by lessor to join in under-leases, &c. in order to apportion the rent.

"And the said [*lessor*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [*lessee*], his executors, administrators, or assigns, that in case the said [*lessee*], his executors, administrators, or assigns shall, at any time or times during the said term hereby granted, under-let or assign any messuage or tenement, messuages or tenements, or other erections and buildings which he or they shall erect or build upon the said piece or parcel of ground hereby demised, or any part or parts thereof, then, and in such case, he the said [*lessor*], his heirs or assigns, shall and will at any time or times after the said messuage or tenement, messuages or tenements, or erections or buildings, which shall be so under-let or assigned, shall be completely finished and made fit for habitation, at the request, costs, and charges of the said [*lessee*], his executors, administrators, or assigns, join and concur in any such under-lease or assignment, or under-leases or assignments, so to be made as aforesaid, for the purpose of ascertaining the proportion of the said yearly rent hereby reserved, which each such under-tenant or assignee, and the premises so under-let or assigned to him, shall be thenceforth subject or liable to pay, (such proportion of the rent to be ascertained by the architect or surveyor for the time being of the said [*lessor*], his heirs or assigns), and for the purpose of exonerating the same, and each such under-tenant or assignee of the premises so to be under-let or assigned to him, of and from the remaining part of the said yearly rent of £—— hereby reserved and made payable; but so and in such manner, that the said [*lessor*], his heirs or assigns, shall not thereby release, prejudice, or affect the said remaining part of the same rent, in respect to the remaining parts of the said hereby demised premises; *And also*, for the purpose of covenanting and declaring, that such under-tenant and assignee, and the premises so to be under-let or assigned to him, shall be thenceforth subject to the covenants, pro-

BUILDING LEASE UNDER A POWER.

visoes, and agreements hereinbefore contained, so far only as such covenants, provisoes, and agreements are or shall be respectively applicable to or shall concern the premises which shall be so under-let or assigned as aforesaid: PROVIDED ALWAYS, that each such under-lease and assignment shall contain and reserve unto the said [*lessor*], his heirs or assigns, a similar proviso for re-entry as is hereinbefore contained, so far as regards the rent and covenants to which such under-lessee or assignee, or the premises so to be under-let or assigned, is or are to be or continue liable as aforesaid (*a*).

Under-lease or assignment to reserve power of re-entry to the present lessor.

(*a*) A proviso to this effect is necessary, inasmuch as the condition of re-entry reserved by the original lease would be extinguished by the apportionment of the rent, *vide ante*, p. 354. For this reason, frequently, where a piece of ground is intended to be leased for building houses, the owner, instead of granting a lease with such a covenant as the present, enters into a contract with the intended lessee to grant separate leases of the houses as they are finished, at certain rents, which seems in general to be the more convenient mode.

In powers to grant building leases, the donee is frequently authorized to enter into contracts of this description, a *maximum* being generally fixed as to the proportion of the entire rent to be thrown upon any given portion of the ground to be sub-demised or assigned, in order to prevent such an inequality in its distribution as to render the security for any part of the rent insufficient. (See a Precedent of a power of this nature, Jarm. Pow. on Devises, Append. 691).

BUILDING UNDER-LEASE *containing, with usual Clauses, special* PROVISO *for* RE-ENTRY, *in case the* BUILDINGS *should* NOT *be* ERECTED, *or should be suffered to be* OUT *of* REPAIR, *after* DAMAGES *for non-repair shall have been twice recovered in a* COURT *of* LAW.—COVENANT *by Lessee to* BUILD *according to a* PLAN, *and prescribing the* DIMENSIONS, MATERIALS *to be* USED, &c.; *also to* PAVE FOOTWAYS, *make* DRAINS, *contribute towards the* EXPENSE *of* LIGHTING, *&c.—That* HOUSE *shall not be* ALTERED. COVENANTS *by the* LESSOR *for* TITLE—*Also to* INDEMNIFY *the* LESSEE *from the* ORIGINAL RENT, *and authorizing him to* REIMBURSE *himself any Monies he may be called upon to pay on account thereof, out of the* SUB-RENT, *&c.—That the* LESSEE *may* DIG CLAY *for* BRICKS, *to be used in Building.*

BUILDING UNDER-LEASE.

THIS INDENTURE, made the —— day of ——, &c. BETWEEN [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part: WHEREAS the said [*lessor*] is possessed of a certain plot, piece, or parcel of ground, situate, &c. *(describe it);* demised to him the said [*lessor*], in and by a certain indenture of lease, bearing date on or about the —— day of ——, 17—, made between [*original lessor*], of &c., of the one part, and [*lessor*] of the other part, *To hold* unto the said [*lessor*], his executors, administrators, and assigns, from the day next before the day of the date thereof, for and during the term of ninety-nine years thence next ensuing, paying unto the said [*original lessor*], if she should so long live, and after her decease unto the person or persons who shall be entitled as therein is

Parties.

Recital of original lease.

BUILDING UNDER-LEASE.

mentioned, the yearly rent of forty-six pounds six shillings, payable in the manner and on the days and times as therein is specified. And whereas the said [*lessor*] sometime since contracted in writing with the said [*lessee*], to grant a derivative lease to him, his executors, administrators, and assigns, of the plot or piece of ground hereafter described, being part and parcel of the piece or parcel of ground hereinbefore mentioned to be demised to him the said [*lessor*], and whereon is intended to be built by him the said [*lessee*], a messuage or tenement, offices and premises, hereinafter particularly described, and hereby intended to be demised, for the term of ninety-eight years, from the day next before the day of the date of these presents, free from all incumbrances, and more particularly the yearly rent of 46*l.* 6*s.*, reserved by the said in part recited indenture of lease, under and subject to the yearly rent, and with such clauses, provisoes, and agreements as are hereinafter contained. And whereas the said [*lessee*] hath, since such agreement, and in pursuance of the same, begun to erect and build, and is now erecting and building on the plot of ground intended to be hereby demised, one substantial stone and timber messuage or tenement, together with the offices thereto belonging, and the same is to be covered-in on or before the —— day of ——, ——. NOW THIS INDENTURE WITNESSETH, That for carrying the said recited agreement into effect, and in consideration of the yearly rent, covenants, provisoes, and agreements hereinafter reserved and contained on the part of the said [*lessee*], his executors, administrators, and assigns to be paid and performed; *And also*, in consideration of the sum of five shillings, &c., he the said [*lessor*] *hath* demised, leased, and to farm let, and by these presents *doth* demise, &c. unto the said [*lessee*], his executors, administrators, and assigns, All, &c. *(parcels)*, being part and parcel of the piece or parcel of ground hereinbefore mentioned to have been demised to him the said [*lessor*], his executors, administrators, and assigns, in and by the said in part recited indenture of lease, and particularly delineated and described on the back of the said in part recited inden-

That lessee has agreed for a derivative lease.

That lessee had, since the agreement, begun to build a house, &c.

Testatum.

Demise.

Parcels.

ture of lease, and numbered, &c. *And also, &c. (general words)* (saving and reserving unto the said [*lessor*], his executors, administrators, and assigns, a way or passage into, through, and under the arch-vaults and area belonging to the said messuage or tenement so intended to be erected as aforesaid, to and from a certain road leading from a mill, now in possession of &c., together with full and free ingress, egress, and regress for the said [*lessor*], his executors, administrators, and assigns, his or their workmen or servants, at all times in the day, to pass and repass to and from the said road, into, through, and under the said vaults and area, without any denial or interruption whatsoever). To HAVE AND TO HOLD the said plot or piece of ground, messuage, or tenement, dwelling-house, offices, and premises hereinbefore described and intended to be hereby demised, and every part and parcel thereof, with the appurtenances, unto him the said [*lessee*], his executors, administrators, and assigns, from the day next before the day of the date hereof, for and during and unto the full end and term of ninety-eight years from thence next ensuing and fully to be complete and ended: YIELDING AND PAYING therefore unto the said [*lessor*], his executors, administrators, and assigns for the first year and one-half of another year of the said term, the rent of a pepper-corn (if demanded): AND ALSO YIELDING AND PAYING therefore unto the said [*lessor*], his executors, administrators, and assigns, for and during the remainder of the said term of ninety-eight years hereby granted, the yearly rent or sum of 6*l.* 6*s.*, clear of and over and above all taxes and charges whatsoever, imposed or to be imposed on the said premises or rent, or any part thereof, by authority of Parliament, or by any other lawful power or authority, at the four most usual feasts or times of payment in the year, *viz.* on the &c. in every year, by equal portions; the first quarter's payment to be made on the —— day of ——: PROVIDED ALWAYS, *and it is hereby declared and agreed by and between the said parties to these presents*, that if the said yearly rent or sum of 6*l.* 6*s.* hereby reserved, or any part thereof, shall be behind and unpaid by the space of twenty days next after any or either of the said days or times hereinbefore appointed for

BUILDING UNDER-LEASE.

Reservation of a right of way.

Habendum, for ninety-eight years.

Reddendum, of a pepper-corn for the first year and a half.

And of 6*l.* 6*s.* afterwards.

Proviso for re-entry in case of non-payment of rent, or of neglect to build; or in case of non-repair after two judgments being obtained

BUILDING UNDER-LEASE.
upon covenant for non-reparation.

the payment thereof, (being lawfully demanded upon or at any time after the expiration of the said twenty days, and not paid when demanded), and no sufficient distress can or may be had or found on the said demised premises to pay the said rent, and all arrears thereof, and all costs attending the same: Or in case the said [*lessee*], his executors, administrators, or assigns, shall not build, complete, and finish the said messuage or tenement, offices and buildings, intended to be erected and built on the said plot or piece of ground hereby demised, according to the covenant of the said [*lessee*] hereinafter contained, by or before the —— day of ——: Or if the said [*lessee*], his executors, administrators, or assigns, shall permit or suffer the said messuage or tenement, offices and buildings hereinafter covenanted to be erected and built, to be out of repair, so and in such manner as that the said [*lessor*], his executors, administrators, or assigns, shall, upon any action to be brought upon the covenant hereinafter contained for keeping the said messuage or buildings in repair, recover judgment for damages for a breach of the said covenant, and shall afterwards obtain a subsequent judgment for a subsequent breach of the said covenant, and after such second judgment the said messuage and buildings shall a third time be permitted or suffered to be out of repair, contrary to the said covenant for repairing the same, that then, or in any or either of such cases, it shall be lawful for the said [*lessor*], his executors, administrators, and assigns, into and upon the said plot or piece of ground hereby demised, or any buildings thereon, or any part thereof in the name of the whole, to re-enter, and the whole to have again, repossess and enjoy, as in his and their first and former estate, [and the said [*lessee*], his executors, administrators, and assigns, and all and every other occupier or occupiers of the said demised premises, thereout and from thence utterly to expel, put out, and amove], any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. And the said [*lessee*], for himself, his heirs, executors, administrators, and assigns, *Doth* hereby covenant and agree with the said [*lessor*], his executors, administrators, and assigns, in manner following, *viz.* That he the said [*lessee*], his exe-

Covenants by lessee.

BUILDING UNDER-LEASE.

cutors, administrators, and assigns, some or one of them will (*covenant to pay rent and taxes*, ut ante, p. 420). *And also*, that he the said [*lessee*], his executors, administrators, and assigns, shall and will, at his and their own proper costs and charges, with all convenient speed, perfectly complete and finish the whole and every part of the said messuage or tenement, offices and buildings, now building or intended to be built on the said hereby demised premises, in a firm, lasting, and workman-like manner, with the best sound materials of all sorts; and shall, on or before the said —— day of ——, roof and cover in the said messuage or tenement, offices and buildings, and on or before the —— day of —— completely finish the same: *And also*, that the said messuage or tenement and buildings, with respect to the situation thereof, the range of line, number of feet in front, the length and depth not exceeding fifty feet, the form and elevation in front, the windows and doors, order of work, the cornices, buildings, and ornaments in front, and in all other respects, shall be built agreeably and conformably to the plan and the elevation in the said plan indorsed on the last skin of this indenture, and this day signed by the parties hereto, and to the explanations and references thereon; and shall and will build the front of such house with free-stone, and cover the roof thereof in front with good sound blue Cornish or white stone, and the roof of the back part of the said house with the same or good stone tile, and good free-stone, crease-stone, and good leaden gutters, not less than six pounds of lead to every superficial square foot; and shall and will affix, in an uniform manner, a circular leaden rain water-pipe, with a neat head, if thereunto required by the said [*lessor*], his executors, administrators, or assigns, to convey the rain-water from the roof of such house; and shall and will point the external faces of all the rough stone walls with proper pointing: And likewise, that the said [*lessee*], his executors, administrators, or assigns, shall and will, at his and their own proper costs and charges, erect and build, or cause to be erected and built, a substantial free-stone or ashlar wall, at the west end of the premises hereby demised, of at least six inches thick, which is hereby declared to be a party-wall be-

To finish the house and cover it in by the —— day of ——.

To build according to a plan, and that the buildings shall be composed of certain materials, and be of certain dimensions.

BUILDING UNDER-LEASE.

tween the said messuage hereby demised and the messuage now being erected by ——; and also shall and will, before the —— day of ——, make the area and turn the arches, when and as soon as the roof of the said building is finished, before the whole front of the same messuage or building, of the width of ten feet, and of the depth from the surface of the foot-way of not less than nine feet, and shall make the level of the first or lowest floor of the said house at least two feet above the level of the highest flood-mark of the river ——, now appearing on the side of a certain mill, in the possession of ——, called &c., situate &c; and shall and will, as soon as conveniently may be, pave a foot-way, of the breadth of ten feet in front, before the area of the said house and building, with proper steps and landing-places, with the best faced —— stone, in a workman-like manner, and edge the same foot-way with fine edging of the same sort of stone, of a proper depth, and separate the foot-way from the said area by a neat iron railing; and that such railing shall range in a straight line, and parallel with the front of such house and building, in an uniform manner, and shall be fixed with the best kind of hard free-stone, kirb or case stone, not less than three inches thick, which kirb or case stone shall not exceed five inches in height from the said foot-way: *And also*, shall and will repair, and keep in repair, the whole of the foot-way and railing in front of the said piece of ground and messuage hereby demised, and also pave and pitch, and hereafter keep in repair, the pitching lying in front of the premises hereby demised, and extending from the said front to the centre of the street made, or to be made, before the premises hereby demised: *And also*, that the end of all trimmers and woodwork used in and about the said building, bearing in any chimney-stack, shall in all instances be let into solid free-stone, so as not to pass through the same: And that all chimneys and flues that shall or may be made in the said messuage or buildings, intended to be erected and built on the plot of ground hereby demised, shall be carried up the main walls of the said messuage or buildings to the top of the same; *And also*, that when and immediately after the said house to be built on the said

To keep in repair a foot-way.

That trimmers shall be of —— free-stone.

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plot of ground hereby demised shall be covered in, the vaults in front of such house shall be immediately turned, the area made, and the foot-way and street before the said building shall be completely pitched, paved, and finished, with all possible expedition; *And also*, that in case the said pitching and paving before the front of the said house shall not be complete and finished, within six months next after the said other house adjoining thereto, now being erected by ——, shall be covered in, it shall be lawful for the said [*lessor*], his executors, administrators, or assigns, to pitch and pave before such house, and completely to finish the same pitching and paving; And that he the said [*lessee*], his executors, administrators, or assigns, shall and will forthwith repay to the said [*lessor*], his executors, administrators, and assigns, all costs and charges that may be incurred thereby. *And also*, shall and will make and construct good and sufficient drains from the front of the said house and offices, and leading from the same offices and buildings to the main sewer, or into the river ———, which shall be sufficient to convey and carry off and from the said house all the foul and other water, at his and their own expense; which drains shall be made of free-stone, ashlar and —— stone, not less than ten inches by eight inches in the clear, and shall keep the same drains in repair. *And also*, that the said [*lessee*], his executors, administrators, or assigns, shall and will, during the first eight years of the term hereby granted, pay a proportional part or share with other the inhabitants of the said buildings called &c., towards the expense of the lamps and the lighting the same throughout the year: *And also*, shall and will, during the first eight years of the said term hereby demised, pay a proportionable part or share with other the inhabitants of the said buildings, called &c., as aforesaid, of the expense of cleaning and keeping clean and free from dirt, dust, and filth of every sort, the whole of the street and ways to be made before the plot of ground, messuage, or tenement hereby granted; *And further*, that the said front of the messuage or tenement so covenanted to be erected and built as aforesaid, shall not, after the same is so built and finished as aforesaid, at any time or

That if pitching shall not be completed, &c., lessor may do it, and shall be repaid by lessee.

To make drains.

To pay a proportional part of the expense of lighting and cleaning.

That the house, after it is built, shall not be altered.

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times be ever altered or varied, without the licence and consent of the said [*lessor*], his executors, administrators, or assigns, in writing, for that purpose first had and obtained; *And also, (Covenant to repair, ut ante,* p. 429; *not to carry on offensive trades, ut ante,* p. 454; *that lessor may enter to view repairs, ut ante,* p. 472; *also to insure and rebuild, ut ante,* p. 456.) PROVIDED ALWAYS, and the said [*lessee*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant, grant, and agree to and with the said [*lessor*], his executors, administrators, and assigns, that in case all or any of the covenants, clauses, and agreements hereinbefore contained, and on the part of the said [*lessee*], his executors, administrators, and assigns to be observed and performed (other than and except the covenants for payment of the said yearly rent hereby reserved, and for building the said messuage, offices, and buildings hereinbefore covenanted to be erected and built, on breach of which a power of re-entry is hereinbefore reserved), shall at any time or times hereafter, during the said term hereby granted, be infringed or broken, or be unperformed in any respect, that then and in any or either of such cases, and from time to time when and so often as the same shall happen, it shall be lawful for the said [*lessor*], his executors, administrators, and assigns, to enter into and upon the premises hereby demised, or any part or parcel thereof, and the same and every part thereof to hold, use, and enjoy, and receive and take the rents and profits thereof, to and for his and their own use and benefit, for such and so long time, and until satisfaction shall be fully made for such breach of any or either of the said covenants, clauses, and agreements, so far as the nature of the case will admit, and all costs, charges, damages, losses, and expenses whatsoever to be sustained or occasioned thereby shall be fully paid and satisfied. *(Covenant by lessee to deliver up premises with fixtures at the end of the term, ut ante,* p. 454.) And the said [*lessor*] for himself, his heirs, executors, administrators and assigns, doth covenant and agree with the said [*lessee*], his executors, administrators, and assigns by these presents, that notwithstanding any grant, act, deed, matter or thing whatsoever, by him the said [*lessor*] had, made, done, committed, suf-

Proviso, that in case of breach of covenants (except those which are before provided against) lessor may enter, until satisfaction.

Covenant by lessor, that recited lease is a subsisting lease.

BUILDING UNDER-LEASE.

fered, or executed to the contrary, the said hereinbefore recited indenture of lease, so as aforesaid granted to him by the said [*original lessor*], is now good and valid in the law for all the residue of the term thereby granted, and no ways surrendered, merged, forfeited, or otherwise become void or voidable; *And also*, that, notwithstanding as aforesaid, he the said [*lessor*] now is well and clearly entitled to the plot or piece of ground, messuage, or tenement, and premises hereby demised for the remainder of the said recited term of ninety-nine years thereof granted to him as aforesaid, without any manner of condition, trust, or any other matter or thing, to charge, determine, incumber, or make void the same: *And also*, that for and notwithstanding any such grant, act, deed, matter, or thing as aforesaid, he the said [*lessor*] now hath in himself good right, full power, and lawful and absolute authority to demise and grant the said plot or piece of ground, messuage, or tenement, and premises hereby demised, or intended so to be, for the said term of ninety-eight years, in manner and form aforesaid, and according to the true intent and meaning of these presents; *And also*, that, for and notwithstanding as aforesaid, the said [*lessee*], his executors, administrators, and assigns, by and under the rents, covenants, and agreements herein reserved, shall from time to time, and at all times hereafter, during the said term hereby granted, peaceably and quietly enter into, have, hold, use, occupy, possess, and enjoy the said plot or piece of ground, messuage, or tenement, buildings, and premises, with the appurtenances, and receive and take the rents, issues, and profits thereof, for his and their own use, without any let, interruption, or denial whatsoever, of or by the said [*lessor*], his executors, administrators, or assigns, or of or by any other person or persons whomsoever, lawfully or equitably claiming, or to claim by, from, or under, or in trust for him: *And that*, free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise well and sufficiently saved, defended, kept harmless and indemnified by him the said [*lessor*], his executors or administrators, of, from, and against all [former and other gifts, grants, demises, assignments, sales, leases, bills,

That he is entitled for residue of term.

That he hath good right to demise.

For peaceable enjoyment.

Free from incumbrances.

BUILDING UNDER-LEASE.

mortgages, rent, and arrears of rent, judgments, executions, extents, acts, titles, trusts, troubles, charges, and] incumbrances whatsoever, had, made, done, committed, suffered, or executed by the said [*lessor*], or any person or persons lawfully claiming or to claim by, from, under, through, or in trust for him (other than the said yearly rent of six pounds six shillings, hereby reserved, and the powers and means hereinbefore provided for securing and recovering the same, and the covenants, provisoes, and agreements herein contained); *And further*, that he the said [*lessor*], his executors, administrators, and assigns, and every person whosoever, having or lawfully claiming any legal or equitable estate, right, title, term of years, or interest whatsoever, of, in, to, or out of the said hereby demised premises, by, from, through, or under, or in trust for him (other than in respect of the said yearly rent hereby reserved, and the powers and remedies hereinbefore provided for securing and recovering the same, and other the purposes aforesaid) shall and will at any time or times hereafter, upon the reasonable request and at the costs and charges in all things of the said [*lessee*], his executors, administrators, or assigns, make, do, acknowledge, levy, suffer, and execute, or cause or procure to be made, &c. every such further and other grant, act, and assurance in the law whatsoever (be it by matter of record or otherwise howsoever), for the more effectually demising and assuring the said hereby demised premises unto the said [*lessee*], his executors, administrators, and assigns, for and during the said term of ninety-eight years, under and subject to the rents and covenants aforesaid, as by the said [*lessee*], his executors, administrators, or assigns, or his or their counsel learned in the law shall be reasonably devised or advised and required. *And also*, (*add covenant to produce the original lease, ut ante*, p. 499). *And also*, that he the said [*lessee*], his executors, administrators, and assigns, shall and will, at all times hereafter, well and truly pay or cause to be paid, unto the person or persons who, for the time being, is or are, or hereafter shall or may be the owner or owners of, and entitled to, the said yearly rent of £——, so as aforesaid reserved and made payable in and by the said indenture of lease,

Except, &c.

For further assurance.

To preserve and produce the original lease, &c.

To pay the rent and perform the covenants in the original lease.

BUILDING UNDER-LEASE.

of the —— day of ——, and every part thereof, and shall and will perform, fulfil, and keep all the covenants and agreements therein contained on the part of the said [*lessor*], his executors, administrators, and assigns; *And also* shall and will save harmless, and keep indemnified the said [*lessee*], his executors, administrators, and assigns, and the said hereby demised premises, of and from the payment of the said yearly rent of £——, [and of and from all distress and distresses, entry and entries, that may, can, or shall be made by any person or persons who is or are, or shall, for the time being, be the owner or owners of and entitled to the said yearly rent; or for or by reason of any non-payment thereof, or of any part thereof; *And also*, of and from breach of any covenant, or any re-entry on account thereof, or claim therein contained]. *And also*, of and from all losses, costs, charges, damages, and expenses whatsoever, which he the said [*lessee*], his executors, administrators, and assigns, or the tenant or occupier for the time being of the premises hereby demised, shall or may pay, bear, suffer, sustain, expend, or be put unto by reason of the non-payment of the said yearly rent of £——, or any part thereof, or of the breach of any covenant or agreement contained in the said indenture of lease, or for or by reason of any proceedings in law or equity on account thereof, or any other matter or thing incident or relating to all or any of the matters aforesaid; *And*, that he the said [*lessee*], his executors, administrators, and assigns, or the premises hereby demised, or any buildings that now are or may hereafter be erected thereon, shall not be liable to any suit, distress, or entry by the said [*lessor*], his executors, administrators, or assigns, for the said rent of six pounds six shillings hereby reserved, or any part thereof, which at any time shall be in arrear; nor shall any other proceedings at law or in equity be taken for the recovery thereof, until the said [*lessor*], his executors, administrators, or assigns, shall have produced and shewed (if thereunto required) unto the said [*lessee*], his executors, administrators, and assigns, or to the person or persons occupying the premises hereby demised, or the buildings that now are or shall or may be erected thereon, a good and lawful acquittance or acquittances, receipt or

And to indemnify lessee therefrom.

That lessee shall not be liable to pay rent until lessor shall have produced the receipt for last half year's rent, reserved by the original lease.

BUILDING UNDER-LEASE.

receipts, from the person or persons who, for the time being, shall be entitled to the said yearly rent of £——, or his, her, or their lawful agent, bailiff, or receiver for the time being, for the same rent, down to the then last preceding quarterly day appointed by the said indenture of lease of the —— day of ——, for payment of the same: *And that* in case any distress or distresses shall or may, at any time or times during the continuance of the term hereby granted, be levied upon the premises hereby demised, or any part thereof, for the said yearly rent of £——, reserved by the said recited indenture of lease, or if the said [*lessee*], his executors, administrators, or assigns, shall be called upon or required to pay any sum or sums of money on account of such rent, or shall incur or sustain any damages or expenses by reason of the non-payment thereof by the said [*lessor*], his executors, administrators, or assigns, in pursuance of his covenant in that behalf hereinbefore contained, then and in such case, and from time to time so often as the same shall happen, it shall be lawful for the said [*lessee*], his executors, administrators, or assigns, to retain the rent hereby reserved, and all arrears thereof then due, or thereafter to become due (*a*), until thereby or therewith he or they shall be fully reimbursed and paid all such rent, monies, and expenses, which he or they shall have paid or expended as aforesaid, together with interest for the same at the rate of 5*l. per cent. per annum* (*b*); provided that the said [*lessee*], his executors, administrators, or assigns, do and shall, when thereunto required, produce and shew unto the said [*lessor*], his executors, administrators, or assigns, the receipt or voucher, or receipts or vouchers, for the payment or payments made by him or them, in the manner and for the purposes aforesaid. And the said [*lessor*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, grant, and agree to and with the said [*lessee*], his executors, administrators, and

That lessee may retain out of rent any monies he may pay on account of the original rent.

That lessee may make bricks out of the ground for the purpose of building.

(*a*) *Vide ante*, pp. 398, 496.

(*b*) Sometimes the lessee is farther indemnified by a power of distress, for which *vide ante*, p. 496.

BUILDING UNDER-LEASE.

assigns, that it shall be lawful for the said [*lessee*], his executors, administrators, and assigns, at any time or times during the said term hereby granted, to dig and break up any part or parts of the said plot or piece of ground hereby demised, (not exceeding ——), in order to get and obtain clay and materials for making bricks and tiles, for the purposes of building and erecting the said messuages or tenements, erections and buildings hereinbefore covenanted to be erected and built as aforesaid, but to and for no other purpose whatsoever, except upon the terms and in the manner hereinafter mentioned: PROVIDED ALWAYS and the said [*lessee*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*lessor*], his heirs, and assigns, that he the said [*lessee*], his executors, administrators, or assigns, shall and will make good and fill up to a level with the surface of the surrounding land, the ground which shall be so dug or broken up for the purpose aforesaid; *And further*, that if the said [*lessee*], his executors, administrators, or assigns, shall at any time or times, during the said term hereby granted, sell or dispose of any bricks or tiles to be made, got, or produced from the said plot or piece of ground hereby demised, or any part thereof, or shall use the said bricks or tiles for any other purpose than that of erecting and building messuages or tenements, stables, coach-houses, or other erections and buildings, in or upon the said plot or piece of ground, or some part or parts thereof, Then, and in either of such cases, the said [*lessee*], his executors, administrators, or assigns, shall and will, upon demand for that purpose made by the said [*lessor*], his executors, administrators, or assigns, pay or cause to be paid unto the said [*lessor*], his executors, administrators, or assigns, the sum of £—— for every thousand bricks or tiles which he or they shall so sell or dispose of, or use for any other purpose than that of erecting and building as aforesaid, and so in proportion for any less quantity than a thousand. IN WITNESS, &c.

But lessee to fill up the ground again.

If lessee sells or otherwise uses bricks, to pay £—— *per* thousand to lessor.

FROM YEAR TO YEAR OF A FARM.

SHORT DEMISE *from* YEAR *to* YEAR *of a* FARM, *containing directions as to the* MODE *of* HUSBANDRY, *&c.*

MEMORANDUM made this —— day of ——, in the year one thousand eight hundred and thirty-one; BETWEEN [*landlord*], of &c., of the one part; and [*tenant*], of ——, in the county of Hertford, Farmer, of the other part;

Demise of certain lands from year to year.

WHEREBY the said [*landlord*] lets, and the said [*tenant*] agrees to take, and hold of him as tenant, All that and those farm and lands called ——, situate in the parishes of —— and ——, in the county of Hertford, excepting a small plantation called —— close (*a*), from

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Distinction between an exception and a reservation.

(*a*) There is this distinction between an exception and a reservation: an exception relates to some existing component part of the thing demised, which is capable of being severed or distinguished from it. A reservation is properly of some right or profit to arise from the subject of the demise, which had previously no separate existence. See Chambers's *Land. & Ten.* 343.

Two early cases may be adduced as illustrating the distinction, and usefully exhibiting an important consequence resulting from it. Thus, where a passage through a certain part of the demised premises was excepted, or rather (according to the distinction just noticed) *reserved* out of a lease; it was held, that an action *of covenant* might be maintained by the lessor against the assignee of the lessee, for an obstruction of the passage, upon the mere words of the reservation. *Bush* v. *Calis*, 1 Show. 388. But, in a case where certain lands were demised to G. with the exception of a particular close, and the lessee gave a bond for the performance of the covenants; the lessee entered upon the excepted close, and it was contended that this was a breach of the implied covenant for quiet enjoyment, which was contained in the exception; but the majority of the Judges held, that the exception was only an agreement that it should not pass, and not an agreement on the part of the lessee not to occupy; and they distinguished it from the case of

FROM YEAR TO YEAR OF A FARM.

Michaelmas-day now next ensuing, upon the terms following, that is to say; tenant to be deemed tenant from year to year; to enter on fallows at Lady-day, 1831; on the other lands, and the house and buildings (except barns) at Michaelmas next, and on the barns at May-day, 1832; either party may determine the tenancy by a notice in writing of nine calendar months or upwards, expiring on any Michaelmas-day: tenant to quit in like manner as before expressed concerning his entry. Rent, 120*l.* payable half-yearly, at Lady-day and Michaelmas-day, without any deduction on account of any tax, rate, or assessment now in existence, or hereafter to be imposed, or on any other account, except the quit-rent and the land-tax, which are to be paid by the landlord: landlord to cause the under-mentioned repairs to the barns to be done as soon as conveniently can be after Lady-day, 1832, at his own costs, and to do the other under-mentioned repairs before Christmas, 1831. Landlord to keep buildings in tenantable repair: tenant to keep the gates, stiles, bars, and fences in good repair, landlord providing rough

Rent.

As to taxes and repairs.

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a person letting lands, *excepting a way, a common, or any other profit, for there the lessee has an interest in the thing excepted.* Lady *Russell* v. *Gulwel*, Cro. El. 657.

Exception, where void for repugnancy.

An exception of the whole thing granted, being repugnant to the grant, is void, *Dorrell* v. *Collins*, Cro. El. 6, and see cases cit. Dy. 264 b, *in marg.*, though there seems to be no ground for the doctrine sometimes laid down, that the exception may not comprise the *greater* part. Shepp. Touchst. 78; Comyn's *L. & T.* 74.

The objection of repugnancy applies wherever the exception renders nugatory any part of the descriptive terms of the grant; thus, in a demise of a house *and shops*, an exception of the shops would be void, as contradicting the grant; *Horneby* v. *Clifton*, Dy. 264 b; but not if the exception were of one only of several shops, leaving enough to satisfy the grant.

So, an exception which is essential to the thing granted, is void; as the lease of a manor, with the exception of the courts. *Browne* v. *Goldsmith*, Moor. 870; *Mabie's case*, Winch, 23; *Acton's case*, Dy. 288 b; *Wyndham* v. *Way*, 4 Taunt. 316; and see *Wheeler* v. *Twogood*, 1 Leon. 118; unless, it is said, where the lease is granted by the king. *Acton's case*, Dy. 288 b. And so it seems of a rectory, excepting the glebe, or of a manor, excepting the demesnes; though, of course, the exception may comprise part of either.

FROM YEAR TO YEAR OF A FARM.

timber; tenant not to lop, cut, or top any oak, ash, or elm tree, or teller, or sapling on the estate, except pollards, usually and of right lopped and topped, and that only for the loppings and toppings, to be solely used for making and repairing the fences to the estate; and to cut and plash the quick-hedges and other fences on the premises, in a husband-like manner, to throw up the soil to the roots of such quick and other fences, and to keep the ditches cleaned and scoured, and the drains and water-courses free and open.—Tenant not to mow any grass or meadow land above once in any one year of his tenancy, and if he break up any old meadow or old pasture land, unless by the landlord's consent in writing, then to pay the further yearly rent of 10*l.* for every acre so broken up, and so in a proportion for any less quantity than an acre.—Tenant to crop the arable land in each year as follows: namely, one equal third part thereof with wheat or barley, one other equal third part with beans, peas, tares, clover or oats, and the remaining third part to lie in fallow.—All turnips grown on any part of the farm, to be consumed by sheep on the land whereon such turnips may be grown.—Same land not to be cropped with wheat twice, or barley twice, or with wheat and barley in any period of three years.—Tenant to use and consume on the farm all hay and straw made and grown thereon.—Tenant to use and spread dung and manure arising or made on the farm, in such manner as that every acre in tillage of the farm aforesaid may be well manured once in every three years of his tenancy. (Except that all hay and wheat straw on the farm unconsumed at the expiration of the tenancy, may be purchased by the landlord or succeeding tenant, at a fair valuation by two indifferent persons, one to be named by each party). Tenant to leave on the premises, without compensation, not only all lent and white straw arising upon or from the premises, and remaining unconsumed thereon at the expiration of his tenancy, but also all dung and manure arising or made on the farm, and then remaining unconsumed.—Tenant to keep clean by well hoeing, twice at the least, and weeding, all the land whilst cropped with beans, peas, tares, or clover.—Tenant to endeavour to prevent any injury by persons, cattle, or sheep, to any of the hedges or trees, or

Course of husbandry.

FROM YEAR TO YEAR OF A FARM.

fences, and to preserve the same, and not to do any injury to any timber or other trees, in taking such loppings as before allowed to him.—Landlord alone, or with any other or others in his company, may shoot game on the estate. —Tenant to permit the cottager to continue personally to hold the cottage on the estate, at the present rent of 40*s. per annum*.—Tenant not to crop or sow any of the land with rape, flax, hemp, or woad.—Tenant not to under-let or assign the premises or any part thereof, (except the cottage).—Tenant on quitting the farm, to receive such pecuniary compensation for improvements in banking and fencing within five years, and good under-draining within ten years next previously, as two arbitrators shall award; which arbitrators shall abate according to the benefit derived by the tenant from such repairs, improvements, and additions, and take into consideration how far, at the expiration of the tenancy, they may be beneficial to the estate: and such arbitrators shall be nominated one by each party, on the request of either party, and if either party neglect or refuse to nominate his arbitrator, the other party may nominate both arbitrators. In witness whereof the parties hereto have set their hands, the day and year first aforesaid.

Landlord may shoot game.

Tenant not to under-let.

—to receive compensation for improvements.

REPAIRS, &c.

Repair the tiling and under-pinning of the house, repair the under-pinning of the stable, three barns and granary, and fresh thatch the barns and granary: repair thatching of the out-buildings; repair or replace defective weather boarding of barns, gates, —— sets of bars and —— stiles in places where landlord and tenant shall consider most proper.

Enumeration of repairs.

OF A FARM UNDER A POWER.

LEASE *of a* FARM, *under a* POWER *in a* SETTLEMENT, *containing the usual* EXCEPTIONS *of* TIMBER, MINES, &c. RESERVATION *of Right to kill* GAME, *(and other Provisions relating thereto), with the Ordinary* CLAUSES *relating to the* CULTIVATION *and* MANAGEMENT *of the* LAND, *with Variations.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——; BETWEEN the Right Honourable J —— Lord —— of the one part, and [*lessee*] of ——, in the county of York, land-surveyor, of the other part: WITNESSETH, that for and in consideration of the rents hereby reserved, and the covenants and agreements hereinafter contained, which on the part of the said [*lessee*], his executors, administrators, and assigns, are to be kept and performed, he the said J—— Lord ——, (by force and virtue of a certain power and authority to him given or reserved, in and by a certain indenture of settlement, bearing date the —— day of ——, ——, and of every other power, right, and authority whatsoever, him hereunto in anywise enabling), *Hath* demised, appointed, leased, set, and to farm letten: AND by these presents *Doth* demise, appoint, lease, set, and to farm let, unto the said [*lessee*], his executors, administrators, and assigns, ALL THOSE several closes, pieces, or parcels of ground, situate, lying, and being in ——, in the parish of ——, in the county of York, allotted to the said [*lessor*], or received by him in exchange, upon the inclosure of the common or waste ground of —— aforesaid, and now called or known by the several names, and containing the several quantities (or thereabouts) hereinafter mentioned, that is to say, *(describe lands)*, All which premises hereinbefore mentioned are now in the occupation of the said [*lessee*], his

Testatum.

Lessor, by virtue of power.

Demises.

Parcels.

under-tenants or assigns, as tenant to the said [*lessor*], *Together* with all and singular ways, paths, passages, waters, water-courses, conveniences, advantages, and appurtenances whatsoever, to the said premises, or any of them, or any part or parts thereof belonging or in anywise appertaining, (saving, excepting, and always reserving out of this present demise unto the said [*lessor*], and the person and persons entitled in remainder or reversion to the said premises, all and all manner of timber and other trees, wood and underwood whatsoever, (*except fruit trees*), which now are, or at any time or times hereafter during the term hereby granted shall be standing, growing, or being in or upon the several lands, grounds, and premises hereby demised, or intended so to be, or any of them, or any part thereof (*a*); *And also*, all

OF A FARM UNDER A POWER.

General words.

Exceptions.

Timber and other trees.

Mines, except quarries of stone.

(*a*) By the exception of trees the soil upon which they grow is excepted; *Smith* v. *Bole*, Cro. Jac. 459; but only, it seems, so much as gives nourishment to the trees; and the lessee is entitled to the underwood and herbage: *Lyford's case*, 11 Rep. 49 b; Dy. 79 a, pl. 45: but where the exception extends to wood and underwood, and coppice, the whole soil is included; *Ive's case*, 5 Rep. 11; *Whalter* v. *Pooley*, Cro. Jac. 427; though the coppice, &c. be described as standing and growing in and upon "*the premises*:" *Hide* v. *Whalter*, Poph. 146: but where there was an exception of all saleable wood then growing, or which should grow thereafter, which had been usually sold by the lord of the premises, with power of entry, &c. for felling and carrying same away, it was held that the soil in a close, which consisted of a wood, was not excepted. *Pincomb* v. *Thomas*, Cro. Jac. 524.

What included in an exception of trees.

An exception of trees in general extends to trees useful for their wood only, and not to fruit-trees, which should therefore be named, where intended to be included. Thus, in *Wyndham* v. *Way*, 4 Taunt. 316, (and see cases cit. Id. n. 318), an exception in a lease of a farm in Devonshire, of "all trees, woods, coppice, wood-grounds of what kind or growth soever," was held not to include apple trees. And this construction was lately held not to be negatived, where, to the exception of "all timber and other trees," was added, "*but not the annual fruit thereof*," the "fruit" being considered as referable to the fruit of such *timber* trees as produced fruit, as oak, elm, and walnut; *Bullen* v. *Denning*, 5 Barn. & Cress. 842; S. C. 8 D. & R. 657; but if the exception be of *apple and other*

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mines, seams, veins, and beds of coal, lead, and iron, and all other mines and minerals whatsoever, (other than

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trees, it will extend to all trees commonly denominated fruit-trees. Lord *Zouch* v. *Moor*, 2 Roll. Rep. 280.

What is timber.

What species of trees constitutes timber is regulated by local custom, which is various, though some trees are timber trees every where, as oak, elm, and ash. Beech, cherry, birch, and horse-chesnut, lime trees and asp; and black-thorn, yew, walnut, willow, crab, and hornbeam—are also timber in some places; Countess of *Cumberland's case*, Moore, 813; *Holliday* v. *Lee*, Moore, 541; *Bibye* v. *Uxley*, Bunb. 192; *Anon.* 2 Roll. Rep. 83; *Wright* v. *Powle*, Gwill. Tith. Cas. 357; *Abbot* v. *Hicks*, 1 Wood's Tith. Cas. 319; *Layfield* v. *Cowper*, 1 Wood, 330; *Downes* v. *Moorman*, 2 Wood, 238; *S. C.* 1 Eagle & Younge, 803; *Guffley* v. *Pindar*, Hob. 219; *Welbank* v. *Hayward*, 3 Wood, 512; *Pinder* v. *Spencer*, Noy, 30; *Walton* v. *Tryon*, Gwill. 827; Duke of *Chandos* v. *Talbot*, 2 P. W. 606; *Rex* v *Minchinhampton*, 3 Burr. 1308; *Aubrey* v. *Fisher*, 10 East, 446; and see Com. *Land. & Ten.* 178. Trees are not timber until they are of twenty years' growth. *Foster* v. *Leonard*, Cro. El. 1.

Lessor's remedies in case of injury done to timber.

Where trees are excepted, the landlord's remedy in case of their being cut or injured by the lessee is an action of trespass and not an action of waste, which can only be brought in respect of those things in which the lessee takes an interest, by virtue of the demise. See *Lushford* v. *Sanders*, Cro. El. 690; *Goodright* d. *Peters* v. *Vivian*, 8 East, 190. For this reason it is sometimes advisable not to except the trees, but to include them in the demise, giving to the lessor an express power to enter and cut them, which has been decided not to except the trees out of the demise; *Lushford* v. *Sanders*, Cro. El. 690; and, therefore, it is waste to cut down or injure them, and subjects the tenant to forfeiture of the place wasted, and treble damages.

Where the trees are not excepted, and a power is not reserved to the lessor to enter and fell them, it is clear that he has no right to do so, as the lessee has an interest in their fruit and shade. 1 Ld. Raym. 552. But if by the act of the lessee, or by tempest, &c., they become severed, the lessee's interest is determined, and the lessor may enter to take them away. *Herlakenden's case*, 4 Rep. 62 b. The lessee having no interest cannot maintain an action against third persons for removing trees; *Evans* v. *Evans*, 2 Camp. 491; but the action must be brought by the lessor, *Berry* v. *Heard*, Cro. Car. 242; *S. C.* Palm. 327; see also 2 Dowl. & Ryl. 4, who may, if the trees have been cut down and carried away by a stranger, either bring an action of trespass against him, or take his remedy by ac-

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quarries of stone, which the said [*lessee*], his executors, administrators, and assigns, are to be at liberty to work during the term hereby granted, for his and their own use and benefit), under or upon the said demised premises, or any of them, or any part thereof, with full and free liberty of access, ingress, egress, and regress to and for the said [*lessor*], and the person and persons entitled in remainder or reversion as aforesaid, and his and their agents, lessees, and workmen, and all and every other persons and person, by his or their appointment or permission, from time to time and at all times during the term hereby granted, with horses, carts, and carriages, or without, into, through, and over all and every or any of the said lands, grounds, and premises hereby demised, to fell, cut down, root up, and saw all or any of the timber and other trees, wood and underwood aforesaid, or to work, rank, and convert the same or any part thereof into charcoal; and to dig, try, search for, and work the said mines, seams, veins, and beds of coal, lead, and iron, and other mines and minerals, other than quarries of stone and slate; and to have, take, and carry away all and every or any of such timber and other trees, wood, underwood, and charcoal, and all and every or any of the produce of the said mines, and minerals, other than as aforesaid, and to make any road or roads, way or ways, or other work or works, for the purposes aforesaid; *And also* to do all other acts whatsoever necessary for the purposes aforesaid, or any of them, making reasonable recompence or satisfaction to the said [*lessee*], his executors, administrators, or assigns, for the damage which shall be sustained by him or them thereby; *And also*, saving, excepting, and reserving unto the said [*lessor*], and the person and persons entitled in remainder or

With liberty of ingress, &c. for lessor;

To fell timber;

And to work the mines.

And to take away the trees and produce of the mines.

Reservation of right to hunt, &c. over the lands.

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tion of waste against the lessee. Ib. See same principle as to fixtures which are parcel of the inheritance, *Farrant* v. *Thompson*, 5 Barn. & Ald. 826.

It has been decided, that a lessee is not bound to provide fences to preserve trees excepted out of his lease from being bitten by his cattle, but that the lessor should himself protect them. *Glenham* v. *Hanby*, 1 Ld. Raym. 739; *Clithero* v. *Higgs*, Sir W. Jones, 388.

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reversion as aforesaid, and his and their game-keepers, and all and every other person and persons by his or their appointment or permission, full and free liberty of hunting, hawking, fishing, and fowling in or upon the said demised premises, or any of them, or any part or parts thereof, at any time or times during the term hereby granted; *And also*, liberty for the said [*lessor*], and his assigns, and the person and persons entitled in remainder or reversion as aforesaid, and his and their agents, servants, and workmen, from time to time, and at all times during the term hereby granted, to enter into and upon all or any part of the said demised premises, in order to view, search into, and see the state and condition thereof; *And also*, saving, excepting, and reserving unto the said [*lessor*], and the person and persons entitled in remainder or reversion as aforesaid, such part or parts of the said lands or grounds hereby demised (not exceeding twenty acres) as he or they shall think proper to take, to be planted with wood, with full liberty of access, ingress, egress, and regress, with all means needful for the purpose of inclosing, planting, preserving, and promoting the growth of the same, he or they making in respect thereof a just and adequate abatement of or in the rent hereby reserved, during the remainder of the term hereby granted (*b*): To HAVE AND TO HOLD the said mill, closes, pieces or parcels of ground and premis e shereby demised, unto the said [*lessee*], his executors, administrators, and assigns, from the date hereof, for and during and unto the full end and term of twenty-one years hence next ensuing, YIELDING AND PAYING yearly and every year, during the said term [unto the said [*lessor*], and in case of his decease during the said term, then from and

And liberty of entry to inspect the condition of the demised premises.

Exception of lands to be taken by the lessor for planting.

Habendum.

Reddendum of several rents in respect of distinct parcels.

As to exception of lands for planting.

(*b*) It is better, if possible, in order to prevent disputes, to fix the rate of allowance to be made for the lands to be taken by lessor for planting, as in the next precedent. The notice there required to be given seems also proper. The excepting these lands out of the demise as here done is not strictly correct, as the demise has a present operation upon them: at all events, if an exception is made of the lands in question, an exception should be made in the *reddendum* in respect of the rent of such lands. In preparing leases under powers, unusual clauses are always to be avoided, unless they are expressly authorized by the power.

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after his decease unto the person or persons for the time being entitled to the said demised premises in possession, subject to the said term], for or in respect of the said lands and hereditaments in A—— aforesaid, the yearly rent or sum of two hundred and eight pounds, of lawful money of Great Britain, and for or in respect of the said mill and hereditaments in B—— aforesaid, the yearly rent or sum of thirty pounds of like lawful money, and for or in respect of the said close or piece of ground in —— aforesaid, the yearly rent of three pounds of like lawful money; the said yearly rents or sums to be respectively paid and payable, free and clear of and from the land-tax and all other taxes, rates, assessments, and deductions whatsoever, Parliamentary, parochial or other, at two feasts or days of payment in the year, that is to say, the feast of Pentecost, and the feast of Saint Martin the Bishop in winter, in each year, by even and equal portions, the first half-yearly payment thereof respectively to begin and be made at the feast of Pentecost, ——(*c*); AND ALSO YIELDING AND PAYING [unto the said [*lessor*] and his assigns, or the person or persons for the time being entitled as aforesaid] (over and above the said several rents hereinbefore reserved) the yearly rent or sum of five pounds of lawful money aforesaid, at the feast days, and in manner and form aforesaid for every acre, and in that proportion for every less quantity than an acre of the said closes, pieces, or parcels of ground hereby demised, or any of them, or any part thereof, which he the said [*lessee*], his executors, administrators, or assigns shall

Reddendum of 5*l.* an acre, for land above ninety-six acres ploughed.

(*c*) Where a tenant for life grants a lease under a power, it is desirable for him that the rent should be payable at as short intervals as possible, because his representatives are not entitled to an apportionment for the proportion which is expired at his death of the period of reservation; but the rent for the entire period belongs to the remainder-man. Unless, therefore, the power requires a half-yearly reservation, the rent should be made payable quarterly; and where the lessor is particularly anxious to prevent any benefit of this kind from accruing to the remainder-man in consequence of his exercise of the leasing power, the rent might be reserved monthly or weekly.

Suggestion as to the reservation of rent in leases under powers.

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at any time or times during the said term, after the expiration of the first ten years thereof, plough or use, or have in tillage, or in course of tillage, over and above the quantity of ninety-six acres (being two-thirds in quantity or thereabouts of the said closes, pieces, or parcels of ground); *And also* for every acre, and in that proportion for every less quantity than an acre, of corn or grain which he the said [*lessee*], his executors, administrators or assigns shall, at any time or times during the said term, take from off or have upon any of the said lands or grounds, or any part thereof, contrary to his covenant hereinafter in that behalf contained, without the licence or consent of the said [*lessor*] or his assigns, or the person or persons for the time being entitled as aforesaid, in writing for that purpose first had and obtained; the first payment thereof respectively to begin and be made on such of the said feast days as shall next happen, after such ploughing, or using, or having in tillage, or taking a crop of corn or grain as aforesaid: AND ALSO YIELDING AND PAYING at the feast days and in manner aforesaid, the like yearly rent or sum of five pounds for every acre, and in that proportion for any less quantity than an acre of meadow or ancient pasture-ground (not meaning hereby such as was parcel of the waste or common of —— aforesaid), parcel of the said demised premises, which he the said [*lessee*], his executors, administrators, or assigns, shall at any time or times during the said term pare, burn, plough, rive out, dig up, or convert into tillage, without the licence or consent of the said [*lessor*] or his assigns, or the person or persons for the time being entitled as aforesaid, in writing for that purpose first had and obtained; the first payment to begin and be made on such of the said feast days as shall next happen after such paring, burning, ploughing, riving out, digging up, or converting into tillage as aforesaid. AND the said [*lessee*] for himself, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said [*lessor*] and his assigns, and the person and persons for the time being entitled as aforesaid, in manner and form following, that is to say, that he the said [*lessee*], his executors, administrators, or assigns, shall and will, yearly and every

And corn and grain taken off the premises.

Also 5*l.* an acre for ancient meadow or pasture ploughed.

Covenant by lessee to pay rent.

year during the continuance of the said term hereby granted, pay or cause to be paid unto the said [*lessor*], and the person or persons for the time being entitled as aforesaid, the yearly rents hereby respectively reserved and made payable as aforesaid, at such feast days and in such manner and form as are hereinbefore appointed for payment thereof, without any deduction whatsoever, according to the true intent and meaning of these presents: *And also* shall and will bear, pay, satisfy, and discharge the land-tax and all other taxes, rates, assessments, and impositions whatsoever, Parliamentary, parochial, or otherwise, which now are or at any time or times during the continuance of the said term shall be charged, laid, assessed, or imposed upon the said hereby demised premises or any part thereof, or upon any person or persons for or in respect of the same, by authority of Parliament, or otherwise howsoever: *And also*, that he the said [*lessee*], his executors, administrators, and assigns, shall and will from time to time and at all times during the continuance of the said term hereby granted, at his and their own costs and charges, well and sufficiently repair, amend, support, maintain, and uphold the said dwelling-houses, mill, and all other erections and buildings which now are or at any time during the said term shall be upon or belonging to the said demised premises, or any part thereof, and the drying kiln, wheels, stones, shafts, hoppers, and other tackle and machinery thereto belonging, now upon the said premises, and specified in a schedule hereunder written; and also such others as shall be added thereto during the said term, with all and all manner of needful and necessary reparations and amendments, so as to keep the same in good and sufficient tenantable repair; and the said dwelling-houses, mills, kiln, and other articles, matters, and things aforesaid so well and sufficiently repaired, amended, supported, maintained, upheld, and kept, shall and will, at the end, expiration, or other sooner determination of this demise, peaceably and quietly yield and deliver up unto the said [*lessor*], or his assigns, or the person or persons for the time being entitled as aforesaid; *And also*, that he the said [*lessee*], his executors, administrators, and assigns, shall and will forthwith insure or

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and taxes.

To repair, and deliver up in repair,

including future erections.

To insure.

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cause to be insured, at some well established insurance office in London or Westminster, or the said county of ——, the said mill and the drying-kiln, wheels, and other tackle and machinery belonging thereto, from damage by fire, to the extent, amount, or value of six hundred pounds, and shall and will keep the same so insured during the said term; and, in case of any such damage, shall and will rebuild or repair the same, as the case may be, to the extent, amount, or value of the sum which shall be due for such insurance as aforesaid; *And also*, that he the said [*lessee*], his executors, administrators, and assigns, shall and will from time to time, during the said term hereby granted, well and sufficiently fence, dress, cut, scour, cleanse, and keep in repair, all the hedges, ditches, fences, mounds, ways, water-courses, drains, ponds, wears, goyts, sinks, sluices, gutters, walls, pales, gates, and stiles, in, upon, or belonging to the said hereby demised premises, or any part thereof; and at the end, expiration, or other sooner determination of the said term, shall and will leave and yield up the same well and sufficiently fenced, dressed, cut, scoured, cleansed, and repaired; *And also*, that he the said [*lessee*], his executors, administrators, or assigns, shall not nor will at any one time during the continuance of the said term hereby granted, after the expiration of the tenth year thereof, plough, or use or have in tillage, or in course of tillage, more than the quantity of ninety-six acres (being two-thirds in quantity or thereabouts) of the said closes, pieces, or parcels of ground hereby demised, without the licence or consent of the said [*lessor*], or his assigns, or the person or persons for the time being entitled as aforesaid, in writing for that purpose first had and obtained; *And further*, that the said [*lessee*], his executors, administrators, or assigns, shall and will well and effectually summer-fallow each part of the said lands, that shall at any time be used in tillage, once at least in every six years; and shall not nor will at any time or times take from off or have upon any part thereof more than two crops of white corn, without the intervention of a summer's fallow, (he or they being at liberty to take one crop of pulse between the said two crops of white corn, and

To dress and repair hedges.

Not to plough more than ninety-six acres at one time.

To summer-fallow once in six years.

Not to have more than two crops of white corn without a summer's fallow.

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hereby agreeing also to have one or more crop or crops of clover, or some other well-known meliorating crop or crops, in the course of tillage, which shall tend to replenish and improve the said land, and being at liberty to sow and grow upon the said lands, when in fallow, collseed or turnips, or any other green crop, provided the same be eaten upon the said lands by sheep or other cattle, and not suffered to stand for seed)(*d*): *And also*, that he the said [*lessee*], his executors, administrators, and assigns, shall and will lay and spread upon every acre of the said lands, when in fallow, twenty-four horse-loads of well burnt and unfallen lime, or twelve sufficient cart-loads of manure, or some other kind of filth of equal value and proper for the said lands, when and so often as the same shall be fallowed: *And that* whenever collseed, turnips, or any other such like crop shall be sown or grown on any of the said lands, at any time or times during the said term, the same shall be eaten upon the said lands by sheep or other cattle, and not suffered to stand for seed: *And also*, that he the said [*lessee*], his executors, administrators, or assigns, shall not nor will, at any time or times during the said term, pare, burn, plough, rive out, dig up, or convert into tillage any meadow or ancient pasture-ground, parcel of the said demised premises, without the licence or consent of the said [*lessor*] or his assigns, or the person or persons

To spread upon lands in fallow a certain quantity of lime or manure.

That turnips shall be eaten upon the land.

Not to plough ancient meadow or pasture.

(*d*) Another mode of husbandry is, to fallow the land once in four years, and to raise the crops in the order described in the following covenant:

Variation.

"And further, that he the said [*lessee*], his executors, administrators, or assigns, shall and will take a crop of oats or barley after the fallow, and sow on the same not less than twelve pounds *per* acre of good clover or trefoil seed, and, after it shall have been so laid down one year, shall and will take a crop of wheat, after that a crop of beans or peas, and shall and will cause the same to be twice well hoed, and shall and will afterwards take another crop of wheat, oats, or barley, and then leave the same to fallow again."

Order of crops.

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for the time being entitled as aforesaid, in writing for that purpose first had and obtained: *And also* shall not nor will, at any time or times, sell or dispose of or carry away any hay, grass, straw, or fodder which shall at any time or times during the said term grow upon or be produced from the said demised premises, or any part thereof, but shall and will spend and consume the same upon the said demised premises: *And also* shall and will duly and regularly set, lay, and spread upon the said demised premises all the dung, compost, and manure which shall from time to time be bred upon the said demised premises, or from the produce arising therefrom during the said term, or (if at the determination of the said term any such dung, compost, or manure shall remain unspread thereupon, shall and will leave the same for the benefit of the said [*lessor*] or his assigns, or the person or persons for the time being entitled as aforesaid, or his or their succeeding tenant or tenants of the said premises, without being paid for the same (*e*); and in general shall and will manage, till, and use all and singular the lands and grounds hereby demised in a good and husband-like manner, so that the same may not be impoverished, but improved; and at the end, expiration, or other sooner determination of the said term, leave and yield up the same in a due and regular course of husbandry and cultivation, and such as shall be consistent

To consume hay, &c. upon the land.

To spread dung upon the land.

And leave same at the end of the term without compensation.

And to manage lands in a husband-like manner.

Variation.

(*e*) This covenant is frequently expressed as follows:—

To spread manure upon the land.

"And further, that he the said [*lessee*], his executors, administrators, or assigns, shall and will spend, spread, and bestow all the muck, manure, dung, and compost that shall arise or be made upon the said demised premises on such part of the lands hereby demised as shall most require the same, except such muck, manure, dung, and compost as shall be made during the last year of the said term hereby granted, which shall be left in the yard of the said demised premises by the said [*lessee*], his executors, administrators, or assigns, without any allowance or compensation for the same."

with the terms and restrictions aforesaid (*f*): *And also* that he the said [*lessee*], his executors, administrators, or assigns, shall not nor will, at any time or times during the said term, fell, cut down, stub, root up, destroy, top, lop, injure, maim, or deface, or cause or suffer to be felled, cut down, stubbed, rooted up, destroyed, lopped, injured, maimed, or defaced any timber or other trees, wood, or underwood whatsoever, now standing, growing, or being, or which shall at any time during the term hereby granted stand, grow, or be in or upon the lands, grounds, and premises hereby demised, or any part or parts thereof, but shall and will, to the utmost of his and their power, preserve and keep the same from any hurt, spoil, or damage, either by cattle or otherwise: *And also*, that in case any person or persons shall do or commit any waste or damage by injuring or destroying any such timber, or other trees, wood, or underwood aforesaid, or shall kill or destroy any game, fish, or wild fowl, or commit any other trespass, damage, or injury in or upon the said demised premises, he the said [*lessee*], his executors, administrators, or assigns, shall and will, as often as he or they shall know or be informed of the same, within twenty days after his or their knowledge or information thereof, give notice in writing thereof, and of the name and place of abode of the respective offender or offenders, or the best description that he or they can give of such offender or offenders, to the agent, steward, bailiff, or other officer of the said [*lessor*], or of the person or persons for the time being entitled as aforesaid; *And also* shall and will permit the name or names of him

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Not to cut down or injure trees.

To give notice of trespassers.

And permit his

(*f*) Sometimes a clause to the following effect is inserted—

"And also, that he the said [*lessee*], his executors, administrators, or assigns, will transmit or cause to be transmitted unto the said [*lessor*] or his assigns, or such person or persons as shall be entitled as aforesaid, in the month of —— in every year during the said term, a true and correct statement or account of the culture of each of the said fields or grounds hereby demised, and of such as are fallow."

To transmit an annual statement of the culture to lessor.

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(lessee's) name to be made use of in proceedings against trespassers.

the said [*lessee*], his executors, administrators, or assigns, to be made use of by the said [*lessor*], or the person or persons for the time being entitled as aforesaid, in charging or giving notice to any person or persons not to come upon the said demised premises, or any part thereof, to seek for, hawk, hunt, course, net, shoot, disturb, or destroy any game, fish, or wild fowl, or commit any other trespass, damage, or injury therein or thereupon, and in commencing, carrying on, and prosecuting any action, suit, or other proceedings against any person or persons for any such trespass, damage, or injury, being indemnified by the said [*lessor*], or the person or persons for the time being entitled as aforesaid, by his or their bond, against all costs, charges, and damages relating thereto: *And also*, that he the said [*lessee*], his executors, administrators, and assigns, shall and will, during the said term, do suit and service at the court of the manor of ——, when and so often as the same shall be held and kept, and shall and will observe and obey such bye-laws, and pay such fines and amerciaments as shall then and there be charged or imposed upon him or them; *And also*, shall and will, during the said term, well and sufficiently maintain and keep one such hound, greyhound, or spaniel, as the said [*lessor*], or the person or persons for the time being entitled as aforesaid, shall require of him or them to be kept: *And further*, that he the said [*lessee*], his executors, administrators, and assigns, shall and will, from and after the feast day of Saint Martin the Bishop in winter next preceding the expiration of the said term, and from thenceforth to the expiration thereof, permit and suffer the said [*lessor*], or the person or persons for the time being entitled as aforesaid, or his or their next succeeding tenant or tenants, and his and their servants and workmen, to enter into and upon the said lands, grounds, and premises hereby demised, or any part or parts thereof, for the purpose of making any kind of husbandry therein or thereupon, for the future occupation and cultivation of the said premises, as need or occasion may require; *And also*, that in case he the said [*lessee*], his executors, or administrators, shall assign, set, or let the said premises, or any part thereof, at any time or times during the said term, to any other

To do suit and service at lessor's court.

To keep a hound or spaniel for lessor.

To permit lessor or succeeding tenant to enter before the end of term, for the purposes of husbandry.

To give notice of assignment and under-letting.

person or persons, he the said [*lessee*], his executors or administrators, shall and will give notice in writing to the said [*lessor*], or the person or persons for the time being entitled as aforesaid, containing a full and proper description of the parcels so assigned, set, or let, and of the person or persons to whom they are set or let, and for what term or time, [and shall and will remain answerable for the rents hereby reserved, which shall be recoverable by distress or otherwise, as if the same had been occupied by himself (*g*)]; PROVIDED ALWAYS *nevertheless, and these presents are upon condition*, that if the yearly rents or sums hereby reserved, or any of them, or any part or parts thereof, shall at any time or times during the said term hereby granted, be behind and unpaid by the space of thirty days next after either or any of the said feast days, whereon the same are hereinbefore by these presents made payable; Or if the said [*lessee*], his executors, administrators, or assigns, shall at any one time during the said term, after the expiration of the tenth year thereof, (without such consent as aforesaid), plough or use, or have in tillage, or in course of tillage, more in quantity than ninety-six acres of the said lands and grounds hereby demised, or shall at any time or times take from off or have upon the said lands or grounds, or any of them, or any part thereof, any crop of corn or grain contrary to his covenant hereinbefore in that behalf contained, or shall at any time or times pare, burn, plough, dig up, rive out, or convert into tillage, any meadow or ancient pasture ground, parcel of the said demised premises, then, and in any of such cases, it shall be lawful for the said [*lessor*], or his assigns, or the person or persons for the time being entitled as aforesaid, into and upon the said hereby demised premises, or any part or parts thereof in the name of the whole, to re-enter, and the same, and every part thereof from thenceforth to have again, re-possess, and enjoy, as in his or their first or former estate, [and the said [*lessee*], his executors, administrators, and assigns, and all other the occupiers thereof, utterly to expel, put

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Proviso for re-entry on non-payment of rent or breach of covenant in ploughing land, &c.

(*g*) This clause is wholly unnecessary, as neither assigning nor underletting discharges the lessee from his covenants. *Vide ante*, p. 389.

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out, and amove therefrom], any thing in these presents contained to the contrary thereof in anywise notwithstanding;

Agreement by lessor for quiet enjoyment.

And the said [*lessor*], for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said [*lessee*], his executors, or administrators, and assigns, that he and they (paying the rents hereby reserved, on the feast days, and in manner and form hereinbefore limited and appointed for payment thereof, and performing all and every the covenants, conditions, and agreements herein contained, which on his and their part are to be observed and performed, and not otherwise), shall from time to time, and at all times during the said term hereby granted, peaceably and quietly have, hold, use, occupy, possess, and enjoy, all and singular the premises by these presents demised, or intended so to be, with the appurtenances, without any eviction, interruption, or disturbance of, by, or from the said [*lessor*], or the person or persons entitled in remainder or reversion as aforesaid, or any person or persons whomsoever, lawfully or equitably claiming, or to claim, by, from, or under him, them, or any of them.

Agreement that lessee shall be at liberty to open and work stone quarries.

And *it is hereby agreed*, that the said [*lessee*], his executors, administrators, and assigns, shall be at liberty to open and work, during the said term hereby granted, any quarries of stone or slate lying or being within or under the said hereby demised premises, situate in —— aforesaid, for his and their own use and benefit,

And dig gravel, &c.

and also to dig, get, and dispose of sand or gravel, in the said piece of ground called the ——, situate in —— aforesaid (*h*). In witness, &c.

Schedule.

THE SCHEDULE to which the foregoing indenture refers:—

One water wheel for shelling oats: One ditto for grinding: Two pit wheels and machinery for three pair of stones, &c. &c.

(*h*) To warrant this clause, it should have been expressly authorized by the power.

OF A FARM IN NORFOLK, WITH LIBERTY OF PURCHASING THE FEE.

LEASE *of a* FARM *in Norfolk, containing* (inter alia) COVENANT *by* LESSEE *to* OCCUPY FARM PERSONALLY, *and not to be* CONCERNED *in any* OTHER FARM.—*Clause of* RE-ENTRY *in case of* BANKRUPTCY, *&c.—Special* COVENANT *as to* REPAIRS; *to keep a Dog for Landlord, and do certain Work for him. —Rather special* PROVISIONS *respecting the* MANAGEMENT *of the* FARM, *and* COURSE *of* HUSBANDRY: PRESERVATION *of* FENCES, *&c. —Liberty to* LANDLORD *to* ENTER *in the* LAST YEAR *of the* TERM, *to* SOW SEEDS, *&c. Also during the Term to take a certain Portion of* LAND *for* PLANTING.—*Lessee not to* ASSIGN *or* UNDER-LET; *to deliver* NOTICES *respecting* GAME, *&c.—Joint and several* COVENANT *by Lessee and* SURETY *for* PERFORMANCE *of* COVENANTS *by* LESSEE. —COVENANT *by* LESSOR *to* REPAIR BUILDINGS; *to* ALLOW ROUGH WOOD *for* REPAIRS; *to* PAY *for* GRASS *left at the End of the Term, and* LAST YEAR'S HAY *and* TURNIPS, *&c.*—TENANT *to* OCCUPY BARN *till* 1*st of May, after the End of Term, and to be* AT LIBERTY *to* PURCHASE *the* INHERITANCE *on certain Terms, within a given Period* (*a*).

THIS INDENTURE, made the —— day of ——, in the year 18—; BETWEEN [*lessor*], of &c., of the first part; [*lessee*], of ——, in the county of Norfolk, farmer, of the

Date.

Parties.

(*a*) This lease was settled by a gentleman of eminence, who was requested to settle it "in the shortest possible form."

OF A FARM IN NORFOLK, WITH LIBERTY OF PURCHASING THE FEE.

second part; and [*surety*], of &c., of the third part: WITNESSETH, that the said [*lessor*] *hath* demised and leased, and by these presents *doth* demise and lease unto the said [*lessee*], his executors and administrators, *All that* farm-house of him the said ——, with the out-houses, edifices, buildings, lands, and hereditaments, to the same belonging, situate in —— aforesaid, containing together by survey one hundred and twenty-three acres, one rood, and eleven perches, with their appurtenances, and now in the occupation of the said [*lessee*], (except and always reserved out of this demise, unto the said [*lessor*], his heirs and assigns, all timber and other trees and saplings whatsoever, and all the under-wood, thorns, bushes and quicksets, now being, or which shall be in or upon the said premises, (but not the lops and tops of pollards and stubs, nor the surplus thorns not required for fencing, which may be taken and used by the said [*lessee*], his executors or administrators, upon the said demised premises), *And also* all mines, chalk, clay, brick, earth, gravel, sand, and stones, with free liberty of ingress, egress, and regress, to and for the said [*lessor*], his heirs and assigns, and his and their agents, servants, and workmen, at seasonable times, into, upon, and from the said premises, for all reasonable purposes, and in particular to view the state and condition thereof, and to repair, and to lay materials there, for the purpose of repairing the buildings thereon, and also with like liberty of ingress, egress, and regress, to and for the said [*lessor*], his heirs and assigns, and his and their agents, servants, and workmen, at seasonable times, and with or without horses, carts, and carriages, in, to, upon, and from the said premises, to view, fell, cut down, hew, saw, convert, and carry away, the said excepted trees, underwoods, thorns, bushes, and quicksets; and to work the said mines, and dig for, and carry away, and dispose of the said chalk, clay, brick, earth, and other excepted things respectively; and to plant and transplant trees, and sow the seeds of trees in the hedge rows, borders, and waste places hereby demised, and to fence and preserve the same from injury thereby, doing as little damage as possible; And also except all game, fish, and wildfowl, with liberty for the said [*lessor*], his heirs and

Premises.

Exceptions.

Timber and other trees.

Mines.

Liberty of ingress, &c.

Reservation of game, and right of sporting.

assigns, and his and their servants, friends, and sequent abodes, at all seasonable times, to hunt, hawk, course, and shoot upon or over the said premises, or otherwise to destroy the game, fish, and wild fowl thereon. To enter and to view the said premises hereby demised, unto the said [lessee], his executors and administrators, for the term of twelve years, to be computed from the eleventh day of October. —— Yielding and paying therefor, yearly and every year, during the first four years of the said term, the rent or sum of £—, and thenceforth yearly and every year during the remainder of the said term, the yearly rent or sum of £—, on the sixth day of April, and the eleventh day of October in every year, by equal portions, except the last half year's rent, which is hereby reserved to be paid on the first day of August next preceding the termination of this demise; And also yielding and paying unto the further yearly rent of £— for every acre of the demised premises not being then in tillage which shall next year last past, which he the said [lessee], his executors or administrators, shall plough or convert into tillage, and so in proportion for any less quantity than an acre. The said last-mentioned rent to commence and be payable as to each several parcel of land so ploughed or converted into tillage as aforesaid, from such ploughing up or conversion of the same as aforesaid, and to continue payable from thenceforth during the then residue of the said term, and to be paid on the same day as the yearly rents of £— and £— hereinbefore reserved are made payable, and the first payment thereof to be made on such of the said days as shall happen next after such ploughing or converting into tillage as aforesaid, and the said several yearly rents to be payable and paid free and clear of and from all land-tax, and all and all manner of present and future taxes, charges, rates, assessments, and payments whatsoever, by authority of Parliament or otherwise. Provided ALWAYS, that if any or either of the said several rents hereby reserved shall be in arrear, in the whole or in part, for twenty-one days next after any or either of the days whereon the same are respectively hereby reserved to be paid as aforesaid, and the same shall be demanded upon

OF A FARM IN NORFOLK, WITH LIBERTY OF PURCHASING THE FEE.

or at any time after the said twenty-one days, and shall not be paid when demanded (*b*), or if the said [*lessee*], his executors, administrators, or assigns, shall break or infringe any or either of the covenants and agreements herein contained, and which by him or them ought to be performed, then and in any or either of the said cases, it shall be lawful for the said [*lessor*], his heirs or assigns, into and upon the said premises, or any part thereof in the name of the whole, to re-enter, and the same to re-possess and enjoy as in his and their first and former estate. AND the said [*lessee*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [*lessor*], his heirs and assigns, in manner following: that is to say, that he the said [*lessee*], his executors, administrators, or assigns, will from time to time during the said term hereby granted, pay or cause to be paid unto the said [*lessor*], his heirs or assigns, the said several yearly rents or sums hereby respectively reserved on the days or at the times hereby appointed for payment of the same, and without any deduction on any account whatsoever (*c*), *And* at his or their own costs, main-

Tenant's covenants—

To pay rent.

(*b*) If the lease is to cease with bankruptcy, &c. add—

Proviso for re-entry, extended to bankruptcy, insolvency, &c.

" or if the said [*lessee*], his executors, administrators, or assigns, or any of them, shall become bankrupt or bankrupts, or take the benefit of any act made or to be made for the relief of insolvent debtors, or compound with his or their creditors for the payment of his or their debts, or make any assignment of his or their personal estate, or any part thereof, for the benefit of his or their creditors, or if any writ of execution shall be levied upon his or their goods or chattels for any debt or sum of money."

(*c*) Sometimes the following covenant is inserted :—

Covenant not to occupy any other farm.

" And also that he the said [*lessee*], his executors, or administrators, shall not nor will, during the said term, hire, occupy, or carry on, or be directly or indirectly, as principal, agent, or otherwise, concerned or engaged in hiring, occupying, or carrying on any other farm or lands whatso-

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tain in good and substantial condition and repair, during the said term, all the glass windows and lead work thereof, doors, shelves, shutters, fixtures, locks, keys, bolts, bars, and other fastenings, racks, and mangers belonging to the said farm-house, barn, stable, and other out-buildings, and also the well, and the going geers thereof, and all the gates, gate-posts, gate-irons, pales, rails, batterns, hedges, ditches, drains, water-courses, and fences belonging to the said premises, and leave and deliver up the same respectively in such good condition and repair at the determination of the said term, being allowed by the said [*lessor*], his heirs, or assigns, sufficient rough timber and thorns for and towards such repairs; *And also* shall or will, yearly during the said term, upon the request and at the appointment of the said [*lessor*], his heirs, or assigns, lay out and expend three pounds *per centum* on the yearly rent, in and about repairing the buildings hereby demised, and produce the receipts and other vouchers for the same: and that in case no such appointment and request shall be made, and the said sum shall not be laid out and expended in any one year, then the said sum, or so much thereof as shall not be expended in manner and for the purpose aforesaid in any one year, shall be expended according to the discretion of the said [*lessor*], his heirs or assigns, in some succeeding year or years, so as to make the total average expenditure of the said [*lessee*], his executors, administrators, or assigns, in and about repairing the said buildings, equal to the sum of three pounds *per centum* on the yearly rent in every year during the said term; *And also* shall, at his or their own costs, cause the wood-work belonging to the exterior and interior parts of the said farm-house to be well and sufficiently painted with two coats of paint at the least in the seventh year of the said term; *And also* shall not keep any swine unrung on the said premises dur-

To keep and leave windows, fences, &c. in repair.

To expend yearly three pounds *per centum* on the rent in repairs.

To paint the house.

Not to keep swine unrung.

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ever, without the previous consent in writing of the said [*lessor*], his heirs, or assigns: *And also* shall and will personally inhabit and occupy the said farm-house, with his or their family during the said term."

OF A FARM IN NORFOLK, WITH LIBERTY OF PURCHASING THE FEE.

ing the said term; *And* shall and will, yearly during the said term, cause all the tiles belonging to the buildings hereby demised to be cleaned, and the moss and dirt to be cleared therefrom, without any allowance (*d*); *And also* shall not nor will buckstall or brow any of the fences belonging to the premises; *And* will, yearly during the said term, cut and scour one-fourteenth part of the said fences, and the ditches belonging thereto, when and where the said [*lessor*], his heirs, or assigns shall, before the tenth day of January in every year, appoint, and, for want of such appointment, where the same, in the judgment of the said [*lessee*], his executors, administrators, or assigns,

To clean tiles yearly.

Not to buckstall.

To cut and scour one fourteenth part of the fences yearly.

To deliver one load of straw yearly.

To keep a dog for landlord.

To do two days' work of a team yearly.

To fetch and carry materials for building.

And provide allowance beer.

(*d*) "*And also* shall and will, yearly during the said term, upon the request and at the appointment of the said [*lessor*], his heirs, or assigns, deliver to him or them one good waggon-load of winter-fern straw, without any allowance; *And* shall at all times during the said term, upon the request of the said [*lessor*], his heirs, or assigns, keep and maintain for him or them one dog, in good order and condition, without any remuneration for the same; *And also* shall yearly during the said term, upon the request and at the appointment of the said [*lessor*], his heirs, or assigns, do, or cause to be done, two days' work of a waggon with four horses and a servant, to any place not exceeding the distance of —— miles from —— aforesaid, without any allowance, and that in case so much work shall not be appointed to be done in any one year, then shall and will, upon the request of the said [*lessor*], his heirs, or assigns, perform, or cause the same to be performed, in some succeeding year or years, and in addition to the work to be done under this covenant in such year or years, so as to make it equal to two days' work of a waggon with four horses and a servant in every year during the said term; *And also* shall or will yearly during the said term, at his and their own expense, fetch and carry all materials which shall be wanted for repairing the buildings hereby demised from any place within the distance of —— miles therefrom, and shall or will provide the customary allowance of beer gratis for all workmen employed in such repairs."

shall be most wanted, and shall take care of and preserve all pieces useful for repairs arising from such cutting; *And also* will, yearly during the said term, cut, open, and spread all mole-hills and ant-hills, and destroy the moles and ants there, and cut and mow all rushes and weeds growing on the meadow and pasture grounds hereby demised, and at such times and seasons as will prevent their future increase; *And also* will, within six years, to be computed from the commencement of the said term, cause three thousand good cart-loads of marle or clay to be carried, laid, and spread upon the arable lands hereby demised; *And also* will, yearly during the said term, spend and consume on the said premises all the turnips, hay, straw, chaff, and stover, which, during the eleven first years of the said term, shall arise from the said premises, and the tithe thereof (if compounded for), and will cause all the muck, dung, and compost, which shall be made upon the said premises during the said eleven first years, to be spread upon such part of the said lands as shall most require the same; and cause all the muck, dung, and compost produced upon the premises in the last year of the said term (except such part thereof as shall be used in preparing for turnips) to be shovelled up in heaps upon some convenient part of the said premises, and there left for the benefit of the said [*lessor*], his heirs, or assigns, without any allowance or compensation; *And also* will, in the last year of the said term, lay, and place all the crops of corn and grain that year growing upon or arising from the said premises, in the barns and stack-yards belonging thereto, and in the succeeding winter season thresh out the same by manual labour, and not with a machine, in the said barn, and deliver or leave the straw, chaff, and calder arising therefrom in good condition, and at convenient times, for the use of the said [*lessor*], his heirs, or assigns, or his or their incoming tenant; *And also*, that he the said [*lessee*], his executors, administrators, or assigns, will not, after the —— first years of the said term (in which time the lands hereby demised are to be brought into the proper course, consistently with the subsequent cultivation thereof hereinafter mentioned), take two successive crops of corn, grain, or pulse from off any part of the said lands; and that every

OF A FARM IN NORFOLK, WITH LIBERTY OF PURCHASING THE FEE.

To level mole-hills.

To marle the arable lands.

To spend stover upon the premises.

To leave straw, chaff, and calder.

Course of husbandry.

OF A FARM IN NORFOLK, WITH LIBERTY OF PURCHASING THE FEE.

Four course shift.

crop of winter corn or pulse shall be taken upon land broken up from olland or grass of one year's lying; and that, immediately after every such crop of winter corn or pulse, he the said [*lessee*], his executors, administrators, or assigns, will summer-till the land, on the fourth earth, and sow good turnip-seed thereon, and cause the turnips produced therefrom to be hoed, scoured, and preserved for a crop; and that, immediately after such crop of turnips, he the said [*lessee*], his executors, administrators, or assigns, will take one crop of lent or summer corn, and with such lent or summer corn lay the land down with sound grass-seeds, and continue the same so laid down for one year, to be computed from the first day of August next after sowing such grass seeds; and will, at the end of the said term, leave the said arable lands in four equal divisions or shifts (as near as the pieces will admit) according to the course or mode of husbandry above prescribed, and leave all the last year's hay and turnips for the benefit of the said [*lessor*], his heirs, or assigns, on being paid for the same, according to a valuation to be made thereof as hereinafter mentioned; *And also*, that he the said [*lessee*], his executors, administrators, or assigns, will permit the said [*lessor*], his heirs, or assigns, to sow grass-seeds with the summer corn to be sown on the said premises in the last year of this demise, and will harrow in the same gratis, and give him or them, or his or their incoming tenant, four days' previous notice of the time of sowing the summer corn; *And also*, that it shall be lawful for the said [*lessor*], his heirs, or assigns, after the first day of June in the last year of the said term, to deposit, stack, and thatch hay and fuel for firing upon a convenient part of the said premises; *And also*, that he the said [*lessee*], his executors, administrators, or assigns, shall not nor will let, under-let, or assign over, or otherwise part with all or any part of the said premises for all or any part of the said term of twelve years therein, without the previous consent in writing of the said [*lessor*], his heirs, or assigns; *And further*, that he the said [*lessee*], his executors, administrators, or assigns, will, at any time during the said term, on receiving six calendar months' notice in writing from the said [*lessor*], his heirs or assigns, for that purpose, quit and yield up to him or them, on the eleventh

Liberty for landlord to sow grass-seeds in last year.

Liberty for landlord to stack hay, &c. on the premises.

Not to assign.

Liberty to landlord to plant part of the land.

OF A FARM IN NORFOLK, WITH LIBERTY OF PURCHASING THE FEE.

day of October next after such notice, any part or parts of the said land hereby demised, not exceeding five acres in the whole, which shall be described in such notice, to the intent that the said [*lessor*], his heirs or assigns, may be enabled to plant the same in such way as he or they shall think fit, and will permit the said [*lessor*], his heirs or assigns, thenceforth to hold and enjoy the same land during the then remainder of the said term, he or they paying or allowing unto the said [*lessee*], his executors, administrators, or assigns, thenceforth during the remainder of the said term, the yearly sum of twenty shillings for every acre of the said land which shall be taken for the purpose aforesaid, and in that proportion for any less quantity than an acre; *And also*, that it shall be lawful for the said [*lessor*], his heirs and assigns, or his or their agent or attorney, by his or their direction, from time to time, and at all times, in case any person or persons shall, at any time or times during this demise, hunt, course, fish, fowl, or sport upon the said premises, or take, kill, destroy, or disturb the game, fish, or rabbits thereon, or attempt so to do, to warn or give notice in the name or names of the said [*lessee*], his executors, administrators, or assigns, to such person or persons to forbear coming upon the said premises; and that the said [*lessee*], his executors, administrators, or assigns, will, upon the request of the said [*lessor*], his heirs or assigns, or his or their attorney or agent, sign, and cause to be delivered, such notice to such person or persons as aforesaid; *And also*, that it shall be lawful for the said [*lessor*], his heirs or assigns, if he or they shall think fit, to bring any action or actions, suit or suits, and prosecute the same, or otherwise proceed against all and every such person or persons, in the name or names of the said [*lessee*], his executors, administrators, or assigns; and that he the said [*lessee*], his executors, administrators, or assigns (*e*), shall not at any time release, disavow, or otherwise

Lessee to deliver notices about game, &c.

(*e*) Where there is a qualified restriction on assignment, as in the present instance, it seems to be proper that the lessee's covenants should extend to his assigns, which will be construed to mean such assigns as he may have, *i. e.* assigns with consent. *Vide ante*, p. 366. In the draft from which this precedent was taken, the covenants were confined to executors and administrators.

As to extending the covenants to *assigns*.

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discharge any such action, suit, or proceeding, without the previous consent in writing of the said [*lessor*], his heirs or assigns, he the said [*lessor*], his heirs, executors, administrators, or assigns, defraying the costs and charges of every such suit, action, and proceeding, and saving harmless the said [*lessee*], his executors, administrators, or assigns, therefrom. And the said [*lessee*], and also the said [*surety*], at the instance and request, and as the surety for the said [*lessee*], do hereby jointly, for themselves, their heirs, executors, and administrators, and each of them doth hereby for himself, his heirs, executors, and administrators, covenant with the said [*lessor*], his heirs and assigns, that he the said [*lessee*], his executors, administrators, or assigns, shall and will pay the above-mentioned yearly rents in the portions and at the times hereinbefore appointed for payment thereof respectively; *And also*, shall and will observe, perform, fulfil, and keep all and singular the covenants, conditions, stipulations, provisoes, and agreements contained in these presents, and on the part of the said [*lessee*], his executors, administrators, and assigns, to be observed, performed, and kept, according to the true intent and meaning thereof respectively. And the said [*lessor*] doth hereby for himself, his heirs, and assigns, covenant with the said [*lessee*], his executors, administrators, and assigns, as followeth, that is to say, that he the said [*lessor*], his heirs or assigns, will during the said term maintain the buildings hereby demised in good and tenantable repair, (such repairs as are herein covenanted to be done by the said [*lessee*], his executors, administrators, or assigns, excepted), and will, on request, assign and allow unto the said [*lessee*], his executors, administrators, or assigns, during the said term, necessary and proper timber, rough wood, thorns, stakes, and bushes, for repairing the gates, posts, pales, rails, hedges, ditches, drains, fences, and other things belonging to the said premises, which are to be repaired by the said [*lessee*], his executors, administrators, or assigns, as aforesaid; *And also*, that in case the said [*lessee*], his executors, administrators, or assigns, shall not consume all the grass and herbage which shall be produced on the said premises in the last year of the said term, he the said [*lessor*], his heirs or assigns, will pay or allow to the said [*lessee*], his executors, administrators, or assigns, so much money for

Tenant and surety covenant to pay the reserved rents.

And perform covenants, &c.

Landlord covenants to keep buildings in repair.

To allow rough wood, &c. for repairing the gates, &c.

To pay for grass and herbage left on the premises.

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the said grass and herbage on the said premises, at the end of the said term, as the same shall be valued to be worth, in the usual way (*f*); *And also*, will pay unto the said [*lessee*], his executors, administrators, or assigns, such sum of money as the last year's hay and turnips shall be valued at as aforesaid, within —— days after the valuation shall be made, and also the customary price and prices for threshing and dressing the last year's crop of corn, pulse, and grain, and shall also cause the same to be carried out to such place or places, not exceeding the distance of —— miles from ——, as the said [*lessee*], his executors, administrators, or assigns, shall appoint, and shall take back the empty sacks; *And also*, that it shall be lawful for the said [*lessee*], his executors, administrators, or assigns, to have the use of the said barn and stack-yard, until the first day of May next after the end of the said term, for laying, threshing, and dressing of the said last year's crops of corn, grain, and pulse; *And further*, that he the said [*lessee*], his executors, administrators, and assigns, truly paying, observing, and performing the rents, covenants, and agreements hereinbefore reserved and contained, and on his and their parts to be paid, observed and performed, shall and lawfully may have, hold, occupy, and enjoy the said premises hereby demised, or intended so to be, and every part of the same, for and during the term of twelve years hereby granted therein, without any let, suit, trouble, eviction, or disturb-

To pay for the last year's hay and turnips; and for threshing and dressing the last year's crops, and to carry out same.

Liberty for tenant to occupy barn, &c. till first May after the end of term.

(*f*) *Or*, (which is rather more definite)—

" according to the custom of the country in and about —— aforesaid."

Variation in regard to the valuation of crops.

Or, " as the same shall be valued by two indifferent persons, the one to be chosen by and on the part of the said [*lessor*], his heirs or assigns, and the other by and on the part of the said [*lessee*], his executors, administrators, or assigns, or by such two persons as either of the said parties shall choose, in case the other of them shall neglect to make his nomination and choice within five days after notice in writing from the first-mentioned party so to do, such notice being delivered to him, or left at his or their usual place of abode in England."

OF A FARM IN NORFOLK, WITH LIBERTY OF PURCHASING THE FEE.

That lessee shall be at liberty to purchase the fee for a certain sum.

ance of or by the said [*lessor*], his heirs or assigns, or any person or persons rightfully claiming or to claim by, from, through, under, or in trust for him, them, or any of them; *And lastly*, that if the said [*lessee*], his heirs or assigns (*g*), shall, at any time before the —— day of ——, which will be in the year ——, be desirous of becoming the purchaser or purchasers of the said hereditaments and premises hereby demised, or intended so to be, and the reversion and inheritance thereof in fee simple, free from all incumbrances, at the price or sum of —— pounds, and shall give to the said [*lessor*], his heirs or assigns, or leave at the last or most usual place of his or their residence or abode in England, seven days' notice in writing of such his or their desire, then, and in that case, he the said [*lessee*], his heirs or assigns, shall be entitled to become the purchaser or purchasers of the same at that sum; and in case the said [*lessee*], his heirs, executors, administrators, or assigns, shall, on or before the said —— day of ——, pay or tender, or cause to be paid or tendered unto the said [*lessor*], his heirs or assigns, the said sum of —— pounds, (and pay all arrears of rent up to that time), then the said [*lessor*], his heirs or assigns, and all other necessary and proper parties, shall and will, at any time after such payment or tender shall be made as aforesaid, on the request and at the costs and charges of the said [*lessee*], his heirs or assigns, make, do, acknowledge, levy, suffer and execute, or cause to be made &c., all such acts, deeds, conveyances and assurances in the law whatsoever, for effectually conveying and assuring the hereditaments and premises hereby demised, and the inheritances in fee simple thereof, and of every part thereof, with their appurtenances, unto and to the use of the said [*lessee*], his

(*g*) The draft was thus framed; but, as in these cases it is generally intended that the benefit of the contract shall go with the lease, the covenant should, it is conceived, be entered into with the lessee, his *executors*, *administrators*, and assigns. Besides, if, (as there is ground to contend, upon the principle of the case referred to in the next note), the heir would be entitled to have the land purchased for him out of the personal estate, *he* would of course elect to purchase, and it is, therefore, improper that the option should reside in him.

heirs and assigns for ever, or to the use of such other person or persons, and in such other manner as he or they shall direct, free from all incumbrances, as by the said [*lessee*], his heirs, or assigns, or his or their counsel in the law, shall be lawfully and reasonably devised or advised and required, and be tendered to be made, done, and executed (*h*). In witness, &c.

OF A FARM IN NORFOLK, WITH LIBERTY OF PURCHASING THE FEE.

(*h*) It has been singularly decided, that where, under a contract of this nature, the election to purchase is made by the lessee after the decease of the lessor, the effect of such election is to convert the property as between his (the lessor's) real and personal representatives into personalty, taking it from the heir or devisee to whom it had descended or come at the death of the lessor as real estate, and thenceforth impressing it with the quality of personalty, for the benefit of the persons taking the personal estate. *Townley* v. *Bedwell*, 14 Ves. 591.

UNDER-LEASE *of* Tithes *of certain* Lands *to the* Occupier *of such Lands, for seventy-nine Years,* Determinable *with the* Life *or* Incumbency *of the* Rector, *the Original Lessor.*

UNDER-LEASE OF TITHES.

This Indenture, made &c.; Between [*lessor*], of &c., of the one part; and [*lessee*], of the other part: Whereas the said [*lessor*] is the lessee or farmer of the great and small tithes of the said parish of ——, under [*original lessor*], who is rector of the said parish, for the term of eighty years, if the said [*original lessor*] shall so long live, and continue to be the rector of the said parish. And whereas the said [*lessee*] is the tenant or occupier of a messuage or tenement, and about two hundred acres of land, situate within the same parish; and the said [*lessor*] hath agreed to grant the great and small tithes payable in respect of the said messuage or tenement, and two hundred acres of land, to the said [*lessee*], upon the terms and in

Recitals.

UNDER-LEASE OF TITHES.

Testatum.

manner hereinafter expressed. NOW THIS INDENTURE WITNESSETH, that, in consideration of the yearly rent, covenants, conditions, and agreements hereinafter reserved and contained on the part of the said [*lessee*], his executors, administrators, and assigns, he the said [*lessor*] *Hath* granted, demised, leased, set, and to

Demise.

farm letten, and by these presents *Doth* grant, &c. unto the said [*lessee*], his executors, administrators, and assigns,

Tithes.

ALL the great and small tithes yearly arising, increasing, growing, and renewing, and which from time to time during the term hereby granted shall yearly arise, increase, grow, and renew, in, upon, from, and out of all that messuage or tenement, and all those two hundred acres of land or thereabouts, situated, *(describe lands)*, and also the

Habendum.

right of retaining the same tithes; TO HAVE AND TO HOLD the said great and small tithes, and all and singular other the premises hereby granted and demised, with their and every of their appurtenances, unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of —— last, for the term of seventy-nine years thence next ensuing, if the said [*original lessor*] shall so long live, and continue to be the rector of the said parish of ——.

Reddendum.

YIELDING AND PAYING, therefore, yearly and every year during the said term hereby granted, determinable as aforesaid, and so in proportion for any less time than half a year, in case the said [*original lessor*] shall die or cease to be the rector of the said parish of ——, in the interval between the days of payment hereinafter mentioned, the rent or sum of £——, clear of all deductions on any account whatsoever; the said rent to be paid and payable by half yearly payments, upon the —— day of ——, and the —— day of —— in every year during the said term; the first payment thereof to be made on the —— day of —— next: and in case the said term shall determine in the interval between any of the said days of payment, the said proportional part of the said yearly rent to be payable and paid on the decease of the said [*original lessor*], or on his ceasing to be rector of the said parish of ——, which shall first happen.

Covenant by lessee to pay rent.

AND the said [*lessee*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [*lessor*], his executors, administrators, and

UNDER-LEASE OF TITHES.

assigns, that he the said [*lessee*], his executors, administrators, or assigns, shall or will from time to time, during the continuance of the said term hereby granted, determinable as aforesaid, pay or cause to be paid unto the said [*lessor*], his executors, administrators, or assigns, the said yearly rent or sum of £——, and also such proportional part thereof as aforesaid, according to the reservation hereinbefore made of the same, and the true intent and meaning of these presents, and also without any deduction or abatement out of the same or any part thereof, for or in respect of any taxes, rates, or other charges whatsoever, now imposed or payable, or hereafter to be imposed or become payable, upon or in respect of the said tithes hereby granted, or any part thereof (*a*). In witness, &c.

As to rents reserved out of tithes.

(*a*) It was at one time doubted whether a rent could be reserved out of tithes, being an incorporeal hereditament, but the affirmative has long been established. See *Dean and Chapter of Windsor* v. *Gower*, 2 Saund. 302; *Bally* v. *Wells*, 3 Wils. 25. It is clear, however, that they cannot be the subject of a distress, and, therefore, the lessor's security for his rent is merely personal.—An action of debt will lie for rent reserved out of tithes. In the next precedent it will be seen the demise is made determinable by the notice of the lessor on the non-payment of rent.

LEASE OF TITHES BY A RECTOR.

LEASE *by a* RECTOR *to the Occupiers of Land within the* PARISH, *of the* TITHES *of their respective* LANDS, *at* RENTS *equal to the estimated* VALUE *of such* TITHES (*a*), DETERMINABLE *by* NOTICE *on* NON-PAYMENT *of* RENT, *and also on the respective Lessees ceasing to be Occupiers of Lands in the Parish, unless the Lands come into the Occupation of other Lessees.*

Parties.

THIS INDENTURE, made &c., BETWEEN the Rev. A. B. clerk, rector of ——, in the county of ——, of the one part; and the several other persons whose names are hereunto subscribed and seals affixed, of the other part.

Recital, that lessor is entitled to tithes.

WHEREAS the said [*lessor*], as such rector as aforesaid, is entitled to all the tithes or tenths, great and small, arising or renewing within the parish of —— aforesaid.

—That lessees hold lands specified in schedule.

AND WHEREAS the said several persons, parties hereto of the second part, are now the tenants or occupiers of the several closes, pieces, or parcels of land, lying within the said parish of ——, and specified in the schedule hereunder written, and the names, qualities, and quantities of the respective lands occupied by them respectively are set forth opposite to their respective names in the said schedule.

—That the tithes had been valued at the sums mentioned in schedule.

AND WHEREAS the said [*lessor*] lately caused a valuation to be made by a competent person of all the said tithes and tenths to which the said [*lessor*] is so entitled as aforesaid; and the yearly value of the tithes of the said several closes, pieces, or parcels of land or ground have

(*a*) It is clear that a lease of this nature would require a separate *ad valorem* stamp, in respect of each occupier, according to the amount of rent reserved to be paid by such occupier.

LEASE OF TITHES BY A RECTOR.

been estimated to amount to the respective sums set opposite to the respective names of the said closes, pieces, or parcels of land or ground in the said schedule. AND WHEREAS it has been proposed and agreed, that the said several persons, parties hereto of the second part, shall have leases granted to them respectively by the said [*lessor*] of the tithes of the several lands occupied by them respectively, at yearly rents equal to the estimated value aforesaid, and subject to the several covenants, conditions, and agreements hereinafter contained. NOW THEREFORE THIS INDENTURE WITNESSETH, that in consideration of the yearly rents hereinafter reserved, and of the covenants, conditions, and agreements hereinafter contained on the part of the lessees to be observed and performed, the said [*lessor*], as such rector as aforesaid, *Hath* granted, demised, and leased, and by these presents *Doth* grant, &c., unto each and every of the several persons, parties hereto of the second part, and the executors, administrators, and assigns of each of them, being tenants or occupiers of the said several closes, pieces, or parcels of land or ground, or any of them, or any part or parts thereof; ALL the tithes or tenths yearly arising, growing, or renewing from or out of the several lands or grounds lying within the said parish of ——, now in the occupation of each such person respectively; TO HAVE AND TO HOLD the said tithes or tenths of the said several lands or grounds, with all benefit and advantage thereof, unto each of the said several persons, parties hereto of the second part, and the executors, administrators, and assigns of each of them, from the —— day of —— last, for and during the term of twenty-five years, if the said [*lessor*] shall so long continue to be the rector of the church of —— aforesaid. YIELDING AND PAYING, therefore, by each of the said lessees respectively, and the executors, administrators, and assigns of each of them, unto the said [*lessor*], or his assigns, in respect of the tithes and tenths hereby demised to each of them respectively, a yearly sum in lawful British money, equal in amount to the sum or sums which in the said schedule hereunder written are set opposite to the respective names and descriptions of the lands or grounds so oc-

Recital of agreement for a lease.

Testatum.

Lessor as rector demises

to the said occupiers,

the tithes.

Habendum.

Reddendum yearly, by each of the several lessees.

LEASE OF TITHES.

cupied as last aforesaid, to be paid yearly on the twenty-ninth day of September in every year, without any deduction or abatement for any parochial or Parliamentary taxes, rates, or assessments, or otherwise; AND ALSO YIELDING AND PAYING (*c*) a proportional sum for any period less than a year which may elapse between the determination of the term hereby granted and the twenty-ninth day of September then next preceding; such last-mentioned rent to be payable on the last day of the said term, and without any deduction as aforesaid. AND each of the said several persons, parties hereto of the second part, for himself, his heirs, executors, and administrators, hereby severally covenants and agrees with the said [*lessor*], his executors, administrators, and assigns, that each such person, his executors, administrators, or assigns, will pay or cause to be paid unto the said [*lessor*], or his assigns, during the term aforesaid, if the said [*lessor*] shall so long continue such rector as aforesaid, the yearly rent or sum hereby reserved in respect of the lands or grounds in his or their occupation, and such proportional part thereof as aforesaid, at the times and in manner aforesaid, and according to the true intent and meaning of these presents; *And also*, that each such person, his executors, administrators, or assigns, will bear, pay, and discharge all taxes, rates, assessments, and impositions to be taxed, assessed, or imposed in respect of the tithes or tenths of the lands or grounds occupied by him or them respectively, to become payable during the continuance of this present demise of such tithes or tenths, and keep the said [*lessor*], his executors and administrators, effectually indemnified against the payment thereof. PROVIDED ALWAYS, *and these presents are upon this express condition*, that in case the yearly rent hereby made payable in respect of the tithes of the lands or grounds in the occupation of any of the said several persons parties hereto of the second part, shall be in arrear, in the whole or in part,

Reddendum for fractional period of a year.

Several covenants by lessees to pay the rent,

and taxes.

Proviso, that if rent due from any lessee shall be in arrear, and lessor shall give notice, the demise shall cease as to such lessee.

(*c*) This *reddendum* of the fractional period of the year should never be omitted, as it is very doubtful whether, without it, the rent for such period is apportionable. *Vide ante*, p. 356.

for the space of thirty days after either of the said days hereinafter appointed for payment thereof: and if in such case the said [*lessor*] shall cause a notice in writing, under his hand, to be delivered at the usual place or places of abode of the person or persons whose rent shall be so in arrear as aforesaid, or to be fixed upon some conspicuous part of the lands or grounds in the occupation of such person or persons, thereby declaring the letting hereby made of the tithes of the last-mentioned lands or grounds to be at an end, then the demise hereby made shall cease and determine with respect to the person or persons whose rent shall be so in arrear, and to whom such notice shall so be given as aforesaid, without prejudice to such demise, so far as concerns any other or others of the said several persons parties hereto, or the executors or administrators of any other or others of them. And *it is hereby further declared and agreed by and between the said parties hereto*, that in case any of the persons parties hereto of the second part, or the executors, administrators, or assigns of them or any of them, shall cease to occupy any of the closes, pieces, or parcels of land or ground specified in the said schedule, and which are now in the occupation of any such person or persons, or shall hereafter come into his or their occupation; and if in such case the lands or grounds, the occupation whereof shall be so vacated, shall come into the occupation of any other or others of the said several persons parties hereto of the second part, or the executors, administrators, or assigns of any other or others of them, then the person or persons into whose occupation the same shall come, shall hold the tithes thereof, under or by virtue of these presents, in the same manner, to all intents and purposes, as the person or persons giving up such occupation had held the same; but in case the lands or grounds, the occupation whereof shall be so vacated as aforesaid, shall come into the occupation of any person or persons not being a party or parties hereto of the second, or the executors, administrators, or assigns of such parties or party, then with respect to such person or persons as shall cease to be occupier or occupiers on the 29th day of September in any year, this demise shall cease and be void on the day on which his or their

In case lessees cease to occupy, and the lands come into the occupation of any of the other parties, demise to continue good as to them;

but not if the lands shall come into the occupation of any other persons.

LEASE OF TITHES.

said occupation shall cease, and with respect to such person or persons as shall cease to be occupier or occupiers at any other time or times than on the 29th day of September, this demise shall cease and determine on the 29th day of September next ensuing the cession or giving up of such occupation as aforesaid; to the end that the benefit of the several demises hereby made of the tithes or tenths aforesaid shall go along with the occupation of the lands or grounds out of which the same arise, and be enjoyed by the said several persons parties hereto of the second part, their executors, administrators, or assigns, so long as they shall be actually in the occupation of the lands or grounds now occupied by the said several parties respectively, or of any other lands or grounds within the said parish of ——, but not otherwise, as aforesaid: PROVIDED ALSO, that none of the said several persons parties hereto of the second part, shall be in anywise responsible for the acts, deeds, and defaults of the other or others of them, or of the executors, administrators, or assigns of any other or others of them, but each of the said several persons shall be considered as holding under a separate and distinct demise, any thing hereinbefore contained to the contrary thereof notwithstanding: PROVIDED LASTLY, that the conversion of meadow and pasture land into tillage, or any other change in the cultivation of the lands and grounds aforesaid, or any part or parts thereof, shall not increase or diminish the several rents hereby reserved, or any of them, nor otherwise alter or affect the terms of the letting hereby made. IN WITNESS, &c.

Lessees not to be responsible for each other.

Tithes not to be affected by change of cultivation of lands.

SCHEDULE ABOVE REFERRED TO.

Names of Occupiers.	Description of Lands, &c.	Quantities of Lands.	Yearly value of Tithes.
		a. r. p.	£ *s. d*
C. D.	Arable.	10 1 8	1 3 6

BY MORTGAGOR AND MORTGAGEE.

LEASE *by Trustees for a Wife's separate Use, in which a* MORTGAGEE *and the* HUSBAND *and* WIFE *join, for fifty Years, if the Wife should so long live.* REDDENDUM *to the* MORTGAGEE, *subject to the Equity of Redemption, and subject to a* PROVISO, *that the* RENT *shall be paid to the* TRUSTEES, *until* NOTICE *by the Mortgagee to the Lessee: that the Trustees' Receipts, until such Notice, shall be good Discharges.* POWER *of* DISTRESS *to* TRUSTEES. COVENANT *by the Lessee to pay the Rent to the Trustees till Notice, and afterwards to the Mortgagee.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——; BETWEEN [*two trustees*], of &c., (trustees named in and acting under the settlement made previously to and in consideration of the marriage of [*husband*], of &c.; with [*wife*], his wife, then of &c., spinster, which settlement is dated on or about &c., and made between &c.; and by the same settlement, the manor and other hereditaments hereinafter mentioned, and intended to be hereby demised, were conveyed to and vested in the said [*two trustees*], their heirs and assigns, during the life of the said [*wife*], *In trust* for her sole and separate use), of the first part; the said [*husband*] and [*wife*], his wife, of the second part; [*mortgagee*], of &c., (who is a mortgagee of the manor and other hereditaments hereinafter mentioned and intended to be hereby demised), of the third part; and [*lessee*], of &c., of the fourth part: WITNESSETH, that in consideration of the yearly rent and covenants hereinafter reserved and contained on the part of the said [*lessee*], his executors, administrators, and assigns, to be paid and performed, the said [*two trustees*] and [*mortgagee*], at the

Parties.

Trustees of the lands for wife's separate use, of first part;

Husband and wife, of second part;

Mortgagee, of third part:

And lessee, of fourth part.

Testatum.

Trustees and mortgagee demise;

BY MORTGAGOR AND MORTGAGEE.

request, and by the direction of the said [*husband*] and [*wife*], his wife, (testified by their severally executing these presents), according to the respective estates, rights, and interests of them the said [*two trustees*], and [*mortgagee*] respectively, but not by way of warranty, *Have*, and each and every of them *Hath* demised, leased, set, and to farm let, *And* by these presents *Do*, and each and every of them *Doth* demise, lease, set, and to farm let, *And* the said [*husband*] and [*wife*], his wife, *Have*, and each of them *Hath* ratified and confirmed, *And* by these presents *Do*, and each of them *Doth* ratify and confirm, unto the said [*lessee*], his executors, administrators, and assigns, ALL THAT capital messuage, &c.; TO HAVE AND TO HOLD the said capital and other messuages, &c. hereby demised, or intended so to be, with the appurtenances, unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of ——, now last past, for the term of fifty years thence next ensuing, *If* the said [*wife*] shall so long live: YIELDING AND PAYING therefore, yearly and every year during the said term hereby granted, determinable as aforesaid, the yearly rent or sum of 200*l.* of lawful money of Great Britain, unto the said [*mortgagee*], his heirs and assigns, subject to such equity of redemption as the said demised premises are now subject or liable to; and subject also to the proviso or agreement hereinafter contained in respect to the intermediate payment of the same rent, until such notice as hereinafter mentioned; Such yearly rent of 200*l.* to be paid and payable to the said [*mortgagee*], his heirs and assigns, free from taxes, and without any other deduction, by equal half yearly payments, on the —— day of ——, and the —— day of ——, in every year; the first half yearly payment to be made on the —— day of ——, now next ensuing (*a*), PROVIDED ALWAYS, *and it is hereby agreed and declared* between and by the said parties hereto, that in the meantime, and until the said [*mortgagee*], his heirs, executors, administrators, or assigns, shall require to have the receipt of the rents and profits of the said hereby demised premises, and shall give

and husband and wife confirm.

Parcels.

Habendum, for fifty years, if wife should so long live.

Reddendum to mortgagee;

subject to equity of redemption;

and subject to subsequent proviso.

Proviso that rent shall be paid to the trustees until notice by mortgagee.

(*a*) See *reddendum* for fractional period, *ante*, p. 480.

BY MORTGAGOR AND MORTGAGEE.

unto the said [*lessee*], his executors, administrators, or assigns, or leave at the said hereby demised premises, notice in writing, requiring the said [*lessee*], his executors, administrators, or assigns, to pay the said rent hereby reserved to him the said [*mortgagee*], his heirs or assigns, the said yearly rent of 200*l.* hereby reserved, shall be paid to the said [*two trustees*], their heirs and assigns, subject to the trusts thereof declared by the said hereinbefore mentioned indenture of settlement; AND the receipt or receipts of the said [*two trustees*], or of the survivor of them, his heirs, or assigns, shall, until such notice shall be given or left as aforesaid, be a good and sufficient release and discharge for the said yearly rent, or any part thereof, unto the said [*lessee*], his executors, administrators, or assigns; AND (*b*) if at any time or times previously to such notice being given or left as aforesaid, the said yearly rent of 200*l.*, or any part thereof, shall be unpaid by the space of fourteen days after the respective days or times whereon the same ought to be paid as aforesaid, *Then*, and in such case, and so often as the same shall happen, (although no lawful demand shall have been made thereof), it shall be lawful for the said [*two trustees*], their heirs and assigns, to enter into, and distrain upon the hereditaments and premises hereby demised, for the said yearly rent, or so much thereof as shall be then in arrear:

Proviso that trustees' receipts, until such notice, shall be good discharges.

Proviso, that until notice by mortgagee, trustees may distrain for rent.

(*b*) The legal reversion being in the mortgagee, an express power is requisite, to enable the trustees to distrain. As to the remedy by distress, see Com. *L. & T.* 317; Chamb. 596; Woodf. 293. In the latter work, 5th edit. p. 293, it is erroneously laid down that the devisee of a rent cannot distrain without an express power, which is contrary to several decisions. See *Buttery* v. *Robinson*, 3 Bing. 392.

Landlord's right of distress, limited by late bankrupt and insolvent acts.

By the late bankrupt act, 6 Geo. 4, c. 16, s. 74, no distress for rent levied after an act of bankruptcy, whether before or after the issuing of the commission), shall be available for more than one year's rent, accrued prior to the date of the commission, but the landlord may prove for the overplus.

So, by the late insolvent debtors' act, 7 Geo. 4, c. 57, s. 31, no distress levied after the arrest or other commencement of the imprisonment of the insolvent, shall be available for more than one year's rent prior to the execution of his conveyance and assignment.

BY MORTGAGOR AND MORTGAGEE.

And the distress and distresses then and there made, to take, lead, carry away, and impound, and in pound to detain and keep, and in due time afterwards to sell and dispose of, or otherwise to act therein according to law; to the intent that, by the ways and means aforesaid, the said [*two trustees*], their heirs or assigns, shall and may be fully paid and satisfied the arrears of the said rent, and also the costs, charges, and expenses which shall be sustained or incurred in consequence of any such distress or distresses; PROVIDED ALWAYS, &c. *(add proviso for* [*mortgagee*] *to re-enter on non-payment of rent, or breach of covenants, ut ante*, p. 423): AND THE SAID [*lessee*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [*mortgagee*], his heirs and assigns, and also separately with the [*two trustees*], their heirs and assigns, by these presents, in manner following, that is to say, *That* he the said [*lessee*], his executors, administrators, or assigns, shall and will, yearly and every year during the continuance of the term hereby granted, pay or cause to be paid unto the said [*two trustees*], their heirs or assigns, until such notice shall be given as aforesaid, and afterwards to the said [*mortgagee*], his heirs or assigns (*c*), the said yearly rent or sum of 200*l.* on the respective days or times, and in such manner as the same are hereinbefore reserved and made payable, according to the true intent and meaning of these presents. *(Add the other covenants by the lessee, and a several covenant by the* [*two trustees*], [*mortgagee*], *and* [*husband*], *for peaceable enjoyment, ut ante*, p. 461). IN WITNESS, &c.

Proviso for re-entry.

Covenant by lessee to pay the rent to the trustees till notice, and afterwards to the mortgagee.

(*c*) In this case the mortgage is treated as a mortgage in fee. If the mortgage were by demise the reservation of rent and covenants should be to and with the mortgagee, his *executors*, *administrators*, and assigns.

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